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## Ortiz Got It Wrong: Why the Seventh Amendment Does Not Protect the Right to Jury Trial in Class Action Suits under FRCP 23

Joshua D. Stadtler

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# *Ortiz* Got It Wrong: Why the Seventh Amendment Does Not Protect the Right to Jury Trial in Class Action Suits Under FRCP 23

JOSHUA D. STADTLER\*

*This Note argues that the Seventh Amendment's jury trial right does not include litigants in class suits and proposes returning class action suits to their equity roots. Part I explores the historical trajectory of class action suits, beginning with their emergence under equity and their status within the Seventh Amendment's law/equity distinction. It then explores the early American jurisprudential recognition of them as exclusively in equity and the erosion of this recognition in the wake of the Rules Enabling Act and the Federal Rules of Civil Procedure. Part II surveys the arc of Supreme Court decisional law that led to Justice Souter's pronouncement in *Ortiz*, examining how various factors, including the Court's reading of the Rules Enabling Act and the Federal Rules of Civil Procedure, served as the predicate for a progressive expansion of the right to jury trial in class action suits. Finally, Part III argues that the Court should abolish the right to jury trial in class action suits under FRCP 23 and restore class action suits to their historical place under equity jurisdiction.*

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## INTRODUCTION

Any constitutionally protected right to jury trial in civil cases hinges on the Seventh Amendment, which provides that “[i]n Suits at common law . . . the right of trial by jury shall be preserved.”<sup>1</sup> By its plain language then, the Seventh Amendment preserves the right to jury trial at common law as it existed in 1789 or 1791,<sup>2</sup> applying “only to actions at

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1. U.S. CONST. amend. VII.

2. The First Congress of the United States proposed the Bill of Rights, consisting of the first ten constitutional amendments, to the legislatures of the several states on September 25, 1789. The Bill of

law”<sup>3</sup> and “not to actions historically classified as equitable.”<sup>4</sup> However, United States Supreme Court jurisprudence in the last fifty years reflects an assumption that the scope of the Seventh Amendment protects the right to jury trial more broadly than a fair reading of the Amendment and a fair understanding of its historical context support.

In the context of class action suits, Justice Souter’s majority opinion in *Ortiz v. Fibreboard* exemplifies this assumption in its statement that “certification of a mandatory class followed by settlement of its action for money damages *obviously* implicates the Seventh Amendment jury trial rights of the absent class members.”<sup>5</sup> But are the Seventh Amendment ramifications as “obvious” as Justice Souter suggests? Justice Souter answers resoundingly in the affirmative, writing without qualification that a “mandatory settlement-only class action with legal issues and future claimants compromises their Seventh Amendment rights without their consent.”<sup>6</sup> To support this proposition, Justice Souter cites the Court’s statement in *Ross v. Bernhard*<sup>7</sup> that, “since the merger of law and equity in 1938, it has become settled among the lower courts that ‘class action plaintiffs may obtain a jury trial on any legal issues they present.’”<sup>8</sup> However, this Note will show that the language of the Seventh Amendment, coupled with its historical context, signifies that it does not constitutionally protect class action litigants’ right to jury trial.

Implicit in Justice Souter’s argument, and in his reliance on case law rather than the Constitution itself, is the tenuous nature of the historical support for a litigant’s right to jury trial in a class suit. At common law, as of 1791, a litigant in a class suit had no right to jury trial; it was a proceeding in equity, not at law.<sup>9</sup> “The class action was an invention of

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Rights came into effect on December 15, 1791, by virtue of having been ratified by three-fourths of the states. *E.g.*, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 & n.9 (1979) (Rehnquist, J., dissenting); *Ingraham v. Wright*, 525 F.2d 909, 923 (5th Cir. 1976); *Anderson v. Laird*, 466 F.2d 283, 309 n.16 (D.C. Cir. 1972); *Raffone v. Adams*, 468 F.2d 860, 864 n.4 (2d Cir. 1972). Generally, the Supreme Court uses “1791, the date of the adoption of the Bill of Rights,” as the reference point to determine the practices of courts at common law as mentioned in the Seventh Amendment. GEOFFREY C. HAZARD, JR. ET AL., *PLEADING AND PROCEDURE* 997 (9th ed. 2005).

3. *United States v. Louisiana*, 339 U.S. 699, 706 (1950).

4. *Brennan v. J.C. Penney Co.*, 61 F.R.D. 66, 67 (N.D. Ohio 1973) (citing *Louisiana*, 339 U.S. at 706).

5. 527 U.S. 815, 845–46 (1999) (emphasis added).

6. *Id.* at 846.

7. 396 U.S. 531 (1970).

8. *Ortiz*, 527 U.S. at 846 (quoting *Ross*, 396 U.S. at 541).

9. Moreover, at common law, as of either 1789 or 1791, there was neither discovery nor joinder of parties, except in limited circumstances. *See* Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1687 (1998) (“The procedural devices of free joinder of claims and discovery were the creatures of equity jurisdiction and were unknown at common law.”). The claimant, as well as the defendant, was ordinarily not accepted as a witness and claims had to be fitted within the constraints of the various common law forms of action. *See id.* at 1687; Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 YALE L.J. 655, 662 (1963) (“At law the parties to action were

equity,' mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs."<sup>10</sup> The jury trial that is "preserved" in the Seventh Amendment, therefore, does not by its terms include class action plaintiffs. Contrary to Justice Souter's opinion in *Ortiz*, the certification of a mandatory class suit in order to effectuate a money damages settlement would not "obviously" implicate the Seventh Amendment.

As Justice Souter's reliance on the Court's decision in *Ross* implies, the notion of a right to jury trial in class suits merely derives from the "merger of law and equity in 1938" and the jurisprudence that followed.<sup>11</sup> This merger consisted of an integration of the historically distinctive procedures of law and equity into the Federal Rules of Civil Procedure (FRCP), a single procedural regime for the federal district courts.<sup>12</sup> Although the Court facilitated this integration by promulgating the FRCP, it was the Rules Enabling Act of 1934 (REA) that empowered the Court to do so, subjecting the Court's promulgation to congressional approval.<sup>13</sup> The notion of a Seventh Amendment jury trial protection for class suit litigants, therefore, is not rooted in the Constitution. Instead, it is merely a product of decisional law, interpreting not the Constitution but a congressional enactment and the Supreme Court's accompanying promulgation of the FRCP. This indicates that the class action plaintiffs' right to jury trial in federal courts is not entirely fixed, but instead is subject to both the inclinations of Supreme Court jurisprudence and the prerogatives of Congress.<sup>14</sup>

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neither competent nor compellable to testify, whereas in equity each party could offer his own sworn statements and also probe the conscience of his adversary by propounding written interrogatories, which had to be answered under oath." (footnote omitted) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES \*442-51) (internal quotation marks omitted)).

10. *Montgomery Ward & Co. v. Langer*, 168 F.2d 182, 187 (8th Cir. 1948) (quoting *Hansberry v. Lee*, 311 U.S. 32, 41 (1940)); see also *Smith v. Swormstedt*, 57 U.S. 288, 302 (1853) ("The rule is well established, that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; and a bill may also be maintained against a portion of a numerous body of defendants, representing a common interest."). In *Langer*, the Eighth Circuit suggested that in order for FRCP 23 to be a useful device in the "field of federal civil litigation," courts should consider "disregard[ing] the ancient and often arbitrary distinctions between actions at law and suits in equity and . . . permit the Rule to operate in all cases to which it justly and soundly may be applied." 168 F.2d at 187.

11. *Ortiz*, 527 U.S. at 846.

12. See FED. R. CIV. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts . . ."); FED. R. CIV. P. 2 ("There is one form of action—the civil action."); see also *Black v. Boyd*, 248 F.2d 156, 163 (6th Cir. 1957).

13. See Rules Enabling Act of 1934, Pub. L. No. 73-415, ch. 651, § 1, 48 Stat. 1064 (1934) (current version at 28 U.S.C. § 2072 (2006)).

14. At least from a historical standpoint, given that it was responsible for the REA—the legislation that served as the foundation for the Supreme Court to bring class suits into the Seventh

This Note argues that the Seventh Amendment's right to jury trial does not include litigants in class suits and proposes returning class action suits to their equity roots. Part I explores the historical trajectory of class action suits, beginning with their emergence under equity and their status within the Seventh Amendment's law/equity distinction. It then explores the early American jurisprudential recognition of class actions as exclusively in equity and the erosion of this recognition in the wake of the REA and the FRCP. Part II surveys the arc of Supreme Court decisional law that led to Justice Souter's pronouncement in *Ortiz*, examining how various factors, including the Court's reading of the REA and the FRCP, served as the predicate for a progressive expansion of the right to jury trial in class action suits. Finally, Part III argues that the Court should abolish the right to jury trial in class action suits under FRCP 23 and restore class action suits to their historical place under equity jurisdiction.

## I. HISTORICAL BACKGROUND

### A. EMERGENCE OF THE CONCEPT OF A CLASS SUIT UNDER EQUITY

The modern class suit evolved from an exception to the "Necessary Parties Rule" in the Court of Chancery, the court that heard suits in equity.<sup>15</sup> The Necessary Parties Rule was "a general rule in equity, [which provided] that all persons materially interested, either as plaintiffs or defendants in the subject matter of the bill ought to be made parties to the suit, however numerous they may be."<sup>16</sup> Situations arose, however, where "it was impossible or impractical to join all 'necessary' parties."<sup>17</sup> As the Necessary Parties Rule would, in those situations, "unfairly deny recovery to the party before the court,"<sup>18</sup> courts forged several exceptions, including an "impossibility exception" that extended to "situations in which interested parties were so numerous that it was

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Amendment's scope—Congress may freely alter that legislative framework and effectuate a change in the jury trial status of class suit litigants.

15. Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1860 (1998); see also *Ortiz*, 527 U.S. at 832 ("[C]lass actions as we recognize them today developed as an exception to the formal rigidity of the necessary parties rule in equity . . ."); Elizabeth J. Cabraser, *Life After Amchem: The Class Struggle Continues*, 31 LOY. L.A. L. REV. 373, 379 (1998) ("[M]odern [Federal] Rule [of Civil Procedure] 23—operative throughout the federal court system, and adopted by most states—has its deepest roots in English equity practice."). For a description of the emergence of the principles of equity and the development of its procedure and practice, see A.K.R. KIRALFY, POTTER'S OUTLINES OF ENGLISH LEGAL HISTORY 247–255 (5th ed. 1958).

16. *West v. Randall*, 29 F. Cas. 718, 721 (C.C.D.R.I. 1820); see also Hazard, *supra* note 15, at 1858 (1998) ("The Necessary Parties Rule required that any person with an interest in the object of the suit be joined as a party."). A modern form of the Necessary Parties Rule is FRCP 19, which concerns the required joinder of parties and contains an exception for class action suits. See FED. R. CIV. P. 19.

17. Hazard, *supra* note 15, at 1859.

18. *Ortiz*, 527 U.S. at 832.

practically impossible to join them all.”<sup>19</sup> Some chancellors handled this problem of numerosness by permitting “suits to be maintained without joinder of all such ‘interested’ parties.”<sup>20</sup> A general principle emerged, however, that regarded absentee members of a numerous group as “parties through the medium of representation.”<sup>21</sup> The equity courts’ early approach to solving the “numerosness” problem of the Necessary Parties Rule served as a “chief antecedent of the modern class suit,”<sup>22</sup> ultimately embodied in the 1966 revision of FRCP 23, the federal procedural rule that governs class certification.<sup>23</sup>

#### B. THE SEVENTH AMENDMENT’S JURY TRIAL RIGHT AND ITS INAPPLICABILITY TO THE CLASS SUIT

Whether the Seventh Amendment entitles a litigant to a jury trial in a class suit—or any civil suit, for that matter—depends on assessment of “the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791.”<sup>24</sup> As is “self-evident from [its] wording,”<sup>25</sup> the Seventh Amendment creates no new right to jury trial: it “does not extend, but merely *preserves* the right to a jury trial ‘[i]n Suits at common law.’”<sup>26</sup> Accordingly, “the reach of the Amendment is limited to those actions that were tried to the jury in 1791 when the

19. Hazard, *supra* note 15, at 1860; see also Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 359 (1967) (“[U]ntil the late eighteenth century equity sought to secure joinder in the suit of all the persons interested in the underlying controversy, but many times tolerated the absence of an interested person when it was shown that his joinder was impossible, or impractical, or involved undue complication.” (citing Geoffrey C. Hazard, Jr., *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254, 1256–82 (1961))).

20. Hazard, *supra* note 15, at 1860. As an example, Hazard cites to an English case, *Att’y Gen. v. Wyburgh*, (1719) 24 Eng. Rep. 534 (Ch.), where an Attorney General sought to establish an entire charge against a small number of the devisees and the defendants objected on grounds that “all of the owners of the charged estates should be joined.” Hazard, *supra* note 15, at 1860 n.46. The court allowed the Attorney General to proceed in bringing the bill and held that the defendants could subsequently bring a bill for contribution from the other devisees. *Id.*

21. Hazard, *supra* note 15, at 1860. The basic premise of the Necessary Parties Rule, as well as the later “Indispensable Party Rule” that required joinder of an absentee party because of the binding effect of a decree, “was that a person not a party to a suit should not be bound by a purported determination of his rights in such a suit.” *Id.* at 1860–61. A core principle of justice in adjudicating a person’s rights is that notice and an opportunity to be heard are required. See *id.* at 1861.

22. *Id.* at 1860.

23. See FED. R. CIV. P. 23; *Ortiz*, 527 U.S. at 833.

24. *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935). The appropriate rules of common law in 1791 can be found by “careful examination of the English reports prior to that time.” *Id.*

25. *United States v. One 1976 Mercedes Benz* 280S, 618 F.2d 453, 456 (7th Cir. 1980).

26. *Ross v. Bernhard*, 396 U.S. 531, 543 (1970) (Stewart, J., dissenting) (quoting U.S. CONST. amend. VII); see also U.S. CONST. amend. VII (“In Suits at common law . . . the right of trial by jury shall be *preserved* . . .” (emphasis added)); James, *supra* note 9, at 655 (“The federal Constitution . . . do[es] not extend but preserve[s] the right of jury trial as it existed in English history at some past time . . . in 1791 when the [S]eventh [A]mendment was adopted . . .”).

Amendment was adopted.”<sup>27</sup> The Amendment uses the term “common law” in “contradistinction to equity,”<sup>28</sup> meaning that “[s]uits in equity, which were historically tried to the court, were therefore unaffected by it.”<sup>29</sup>

From the time of the earliest interpretation of this constitutional language, as Justice Story wrote in an 1812 circuit court opinion, it has been understood that, “[b]eyond all question, the common law here alluded to is . . . the common law of England, the grand reservoir of all our jurisprudence.”<sup>30</sup> The right that the Amendment preserves, therefore, is the right to jury trial as it “existed under the English common law when the amendment was adopted.”<sup>31</sup> As Chief Justice Taft wrote in *Liberty Oil Co. v. Condon National Bank*, the Seventh Amendment should be construed in light of “the practice in the Courts of Law and Chancery in England when our Constitution and the Seventh Amendment were adopted.”<sup>32</sup>

In 1791, the English common law maintained two distinct sets of trial courts: “courts of law, in which jury trials were mostly available, and courts of equity, in which they mostly were not.”<sup>33</sup> Whether the Seventh Amendment preserves the right to jury trial in a particular context, therefore, depends on a specific and narrow historical test: the distinction between law and equity jurisdictions as it existed in the English courts in

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27. *Ross*, 396 U.S. at 543 (Stewart, J., dissenting).

28. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446 (1830); *see id.* at 447 (“[T]his distinction was present to the minds of the framers of the amendment. By *common law*, they meant . . . not merely suits, which the *common law* recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered . . .”). In *Parsons*, Justice Story also argued that, “[i]n a just sense, the [A]mendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.” *Id.* Subsequent to the FRCP’s merger of law and equity in 1938, the Supreme Court in *Ross* would rely on this formulation to further advance the notion that the Seventh Amendment issue actually “depends on the nature of the issue to be tried rather than the character of the overall action.” *Ross*, 396 U.S. at 538 (majority opinion).

29. *Ross*, 396 U.S. at 543 (Stewart, J., dissenting).

30. *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812).

31. *Balt. & Caroline Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935) (“The aim of the amendment, as this Court has held, is to preserve the substance of the common-law right of trial by jury . . .”); *see also* *Thompson v. Utah*, 170 U.S. 343, 350 (1898), *overruled on other grounds* by *Collins v. Youngblood*, 497 U.S. 37 (1990) (“It must consequently be taken that the word ‘jury’ and the words ‘trial by jury’ were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument . . .”). Although nearly “all the thirteen colonies, and their successors the original thirteen states” utilized a jurisprudence that divided law and equity on similar lines to the English courts, these bodies of law were more “spotty and inconsistent” than their English counterparts. HAZARD, *supra* note 2, at 997. For this reason, the Court decided “early on” that the term “common law” in the Seventh Amendment “would be determined by reference to the practice of the English courts . . . rather than by reference to colonial practice.” *Id.*

32. 260 U.S. 235, 243 (1922).

33. HAZARD, *supra* note 2, at 997.



1791.<sup>34</sup> The Seventh Amendment only guarantees the right to jury trial in cases that the law courts of English common law would have handled.<sup>35</sup> In line with the Supreme Court's "longstanding adherence to [the] historical test," therefore, the inquiry as to whether the Seventh Amendment guarantees a jury trial hinges on whether the cause of action in question "either was tried at law at the time of the founding or is at least analogous to one that was."<sup>36</sup> While some legal commentators have criticized the historical test for being insufficiently dynamic,<sup>37</sup> other scholars have argued that as "the value of jury trial in civil cases today is a hotly disputed issue," the historical test provides the greatest certainty because it protects the right to jury trial from active courts seeking either to restrict or expand its scope.<sup>38</sup>

The Judiciary Act of 1789<sup>39</sup> that established the federal court system "did not create separate equity and law courts" akin to the English courts.<sup>40</sup> The federal courts retained "different procedures approximately corresponding to the two sets of English courts," whereby a single court

34. See *Redman*, 295 U.S. at 657; *Thompson*, 170 U.S. at 350; HAZARD, *supra* note 2, at 997. The Framers believed either that this distinction "provided a workable constitutional test" or viewed the "adoption of the existing practice" as "an acceptable political resolution of an issue upon which the adoption of the Constitution was thought to depend." HAZARD, *supra* note 2, at 997; see also James, *supra* note 9, at 657 (noting that the Constitution and most state constitutions "preserve the right to jury trial upon what may be called a historical test"). For a discussion on whether the historical test "freezes the right absolutely as it was in England in 1791" or whether the test is more elastic, see James, *supra* note 9, at 657-63.

35. See *Redman*, 295 U.S. at 657; *Thompson*, 170 U.S. at 350; HAZARD, *supra* note 2, at 997.

36. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) (internal quotation marks omitted) ("If the action in question belongs in the law category, we then ask whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.").

37. See, e.g., John C. McCoid, II, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover*, 116 U. PA. L. REV. 1, 11 (1967) (concluding that a modern, more flexible application of the historical test "fits well with the conception of the Constitution as a durable document providing continually useful standards for an evolving society"); Martin Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 Nw. U. L. REV. 486, 487 (1976) ("[B]lind adherence to history would seem to place modern judicial administration in an historical strait jacket, controlled by the policies of a society of 200 years ago."); see also Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 IOWA L. REV. 145, 148-51 (2001) (arguing that the Seventh Amendment's text was merely "precatory" and did not amount to an articulation of which types of cases the jury must decide).

38. See James, *supra* note 9, at 664 (noting that the arguments in favor of the historical test are "(1) its greater protection of the jury trial right from inroads by active courts which would restrict the right; (2) the curb it would put upon equally active courts bent on enlarging scope of jury trials; and (3) its greater certainty"). James further argues that since the Constitution "embod[ies] a judgment that [the jury trial right] should be neither expanded (by any general procedural system) nor contracted at all, much can be said for a static historical test." *Id.*

39. See Judiciary Act of 1789, ch. 20, 1 Stat. 73-93 (1789).

40. HAZARD, *supra* note 2, at 997; see also GARY L. McDOWELL, *EQUITY AND THE CONSTITUTION* 44-47 (1982) (providing an historical account of how Congress handled the distinctive procedures of law and equity in its establishment of the federal court system).

hears a case either on the law or the equity side.<sup>41</sup> Along those lines, the Supreme Court declared in the 1855 case *Dodge v. Woolsey*, that “the equity jurisdiction of the courts of the United States . . . is the same in nature and extent as the equity jurisdiction of England, from which it is derived.”<sup>42</sup> Therefore, although the structure of the federal courts arguably made it more difficult to employ the Seventh Amendment’s test, the law/equity distinction still governed the applicability of the right to jury trial.<sup>43</sup> As “[t]he class suit was an invention of equity” and not an action at law under the common law of England,<sup>44</sup> from the inception of the federal court system, at least until the adoption of the FRCP in 1938, class suits in the federal courts were “permitted only in equity.”<sup>45</sup>

### C. EARLY AMERICAN JURISPRUDENCE’S TREATMENT OF CLASS SUITS UNDER EQUITY JURISDICTION

In the early nineteenth century, American courts consistently permitted class suits only in equity both for reasons connected to the historic distinction between law and equity inherited from England and utilized in the Seventh Amendment and for reasons of “[p]ractical necessity.”<sup>46</sup> From a historic standpoint, not only did the rigid common law rules that originated in England discourage joinder of parties but the “procedural machinery of the law courts was not [as] well adapted” as equity courts for “protect[ing] the rights of [the] unknown, unnamed or nonparticipating persons whose interest in the dispute might be concluded” by class action litigation.<sup>47</sup> From a practical standpoint, by utilizing the “representative suit device,” American equity courts could prevent numerosity of plaintiffs in class suits from “disabl[ing] large groups of individuals who were united in interest from enforcing their rights or mak[ing] it possible for them to immunize themselves from liability for their wrongs.”<sup>48</sup>

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41. HAZARD, *supra* note 2, at 997; *see also* McDOWELL, *supra* note 40, at 44–47.

42. 59 U.S. (18 How.) 331, 347 (1855) (citing *Gordon v. Hobart*, 10 F. Cas. 795 (C.C.D. Me. 1836)).

43. HAZARD, *supra* note 2, at 997. It is worth noting that the Seventh Amendment only concerns suits proceeding in federal court; the Supreme Court has held that state courts “are left to regulate trials in their own courts in their own way.” *Walker v. Sauvinet*, 92 U.S. 90, 92 (1875).

44. *Hansberry v. Lee*, 311 U.S. 32, 41 (1940).

45. William Weiner & Delphine Szyndrowski, *The Class Action, From the English Bill of Peace to Federal Rule of Civil Procedure 23: Is There A Common Thread?*, 8 WHITTIER L. REV. 935, 955 (1987).

46. *Id.* (quoting 7 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1751 (1st ed. 1972)).

47. *Id.* (quoting WRIGHT & MILLER, *supra* note 46, § 1751).

48. *Id.* (internal quotation marks omitted) (quoting WRIGHT & MILLER, *supra* note 46, § 1751); *see also* James, *supra* note 9, at 662 (describing how in equity, “the chancellor could handle multiple parties and the possibility of multiple suits in a way that the law courts” could not). Among the concerns of equity jurisdiction was “mitigat[ing] the hardships of the dual system.” *Id.* at 663.

There are several prominent examples in American jurisprudence in the nineteenth century reflecting the consistent recognition of class suits as under equity jurisdiction. These include Justice Story's 1820 circuit court opinions in *West v. Randall*<sup>49</sup> and *Wood v. Dummer*,<sup>50</sup> his 1840 treatise on equity pleadings,<sup>51</sup> Federal Equity Rule (FER) 48,<sup>52</sup> and *Smith v. Swomstedt*,<sup>53</sup> the leading Supreme Court case applying FER 48.

Justice Story, who is credited with "virtually creat[ing] the American law of class suits,"<sup>54</sup> treated representative, or class, suits as resting on "the equity side of th[e] court," whereby the court "administer[s] the principles of chancery jurisprudence."<sup>55</sup> Accordingly, Justice Story rooted his treatment of class suits in English equity jurisprudence, thereby asserting the proposition that there are exceptions to the Necessary Parties Rule allowing a suit in equity to go forward despite the nonjoinder of all interested parties.<sup>56</sup> Included in these exceptions are cases where "the parties are very numerous [such] that it will be almost impossible to bring them all before the court[] or where the question is of general interest, and a few may sue for the benefit of the whole."<sup>57</sup> In cases of this nature, Justice Story wrote, the parties before the court bring suit not merely on their own behalf, but also for other interested non-parties.<sup>58</sup> Pursuant to those exceptions, absent interested parties could be characterized and treated in equity either as "necessary parties who must be joined" or as parties "already represented by a party to the suit."<sup>59</sup> Justice Story's notions for treating class suits in equity, which were further developed in his 1840 treatise on equity pleadings,<sup>60</sup> served as the foundation for the federal courts'

49. 29 F. Cas. 718 (C.C.D.R.I. 1820).

50. 30 F. Cas. 435 (C.C.D. Me. 1824).

51. JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS (2d ed. 1840).

52. 42 U.S. (1 How.) LVI (1842), *reprinted in* JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES 104-05 (1913).

53. 57 U.S. (16 How.) 288 (1853).

54. Hazard, *supra* note 15, at 1878; *see* Weiner & Szyndrowski, *supra* note 45, at 955-58.

55. *West v. Randall*, 29 F. Cas. 718, 721 (C.C.D.R.I. 1820).

56. *Id.* at 722.

57. *Id.* Another example of an exception that Justice Story provides is "where the parties form a part of a voluntary association for public or private purposes, and may be fairly supposed to represent the rights and interests of the whole." *Id.* These pronouncements were reaffirmed in *Wood v. Dummer*, where Justice Story held "that where parties are so numerous that it is inconvenient or impracticable to bring all before the court," the Necessary Parties Rule "shall not be applied." 30 F. Cas. 435, 439 (C.C.D. Me. 1824).

58. *See Randall*, 29 F. Cas. at 722.

59. Weiner & Szyndrowski, *supra* note 45, at 956.

60. Justice Story had developed these concepts in two prior treatises. *See* 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE (Boston, Hilliard, Gray & Co. 1836) [hereinafter STORY, EQUITY JURISPRUDENCE]; JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS (1st ed. 1838).

treatment of class suits first in FER 48 and later in Rule 23 of the FRCP.<sup>61</sup>

FER 48,<sup>62</sup> one of the Equity Rules promulgated by the Supreme Court in 1842, reflected and codified Justice Story's recognition of class suits in equity, as an exception to the Necessary Parties Rule.<sup>63</sup> In 1853, in *Smith v. Swormstedt*, "the most important of all nineteenth-century class suits,"<sup>64</sup> the Supreme Court likewise echoed Justice Story's recognition of class suits as a matter of equity jurisdiction: "For convenience, therefore, and to prevent a failure of justice, a *court of equity* permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court."<sup>65</sup> In subsequent decisions during the late nineteenth and early twentieth centuries, ranging from *Ayres v. Carver*<sup>66</sup> in 1854 to *Supreme Tribe of Ben-Hur v. Cauble*<sup>67</sup> in 1921, the Supreme Court consistently reaffirmed the principle that class suits were cognizable only in equity.<sup>68</sup>

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61. Hazard, *supra* note 15, at 1878; Weiner & Szyndrowski, *supra* note 45, at 958–59.

62. Note that in 1912, the Court revised the Federal Equity Rules, changing FER 48 to FER 38. See, e.g., *In re Teletronics Pacing Sys. Inc.*, 186 F.R.D. 459, 470 (S.D. Ohio 1999) ("Like Equity Rule 48, Rule 38 allowed representative class action-type suits. However, in contrast to Equity Rule 48, Rule 38 established that absent parties could be bound by subsequent judgments pursuant to this rule."), *rev'd on other grounds*, 221 F.3d 870 (6th Cir. 2000). As the district court in *Teletronics* noted, "Rule 48 did not bind absent parties to the resulting judgments," but merely "provided the courts with a convenient device to maintain class action-type suits, while at the same time insure that the interests of all of the members of the class—both present and absent—were properly protected." *Id.*

63. See Weiner & Szyndrowski, *supra* note 45, at 958–59. FER 48 provided that "[w]here the parties . . . are very numerous, and cannot . . . be all brought before it, the Court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests . . . in the suit properly before it." 42 U.S. (1 How.) LVI (1842), reprinted in JAMES LOVE HOPKINS, *THE NEW FEDERAL EQUITY RULES* 104–05 (1913).

64. Hazard, *supra* note 15, at 1897.

65. 57 U.S. (16 How.) 288, 303 (1853) (emphasis added). Although the Federal Equity Rules and the Supreme Court were united in recognizing class suits as a matter of equity jurisdiction, it is worth noting how *Swormstedt* held "that absentees in a representative suit were bound" whereas the Equity Rules stated "that absentees were not bound." Hazard, *supra* note 15, at 1901–02.

66. 58 U.S. (17 How.) 591 (1854). In *Ayres*, the Court reaffirmed the *Swormstedt* Court's recognition of class suits as a matter of equity jurisdiction, but dismissed the suit for want of jurisdiction on the basis that the particular interests asserted in the suit were "separate and independent, without anything in common." *Id.* at 594.

67. 255 U.S. 356 (1921). In *Cauble*, the Supreme Court held that class suits are cognizable in equity by virtue of the fact that they "were known before the adoption of our judicial system" because of their "use in English chancery." *Id.* at 366. The Court's holding reaffirmed federal district courts' entitlement to equity jurisdiction in class suits and the fact that courts' decrees "bind all of the class properly represented." *Id.* at 367. The *Cauble* decision came after the Court's 1912 revision of the Federal Equity Rules, which, as noted above, changed the class suit rule number from 48 to 38 and excised the previous rules' reservation of absentees' rights in class suits. See Hazard, *supra* note 15, at 1923–24.

68. See Hazard, *supra* note 15, at 1902–09, 1917–37; Weiner & Szyndrowski, *supra* note 45, at 959–73.

#### D. THE RULES ENABLING ACT OF 1934 AND THE ADOPTION OF THE FEDERAL RULES OF CIVIL PROCEDURE IN 1938

The REA gave the Court the power to promulgate the FRCP.<sup>69</sup> After the Court's enactment, the FRCP were adopted in 1938.<sup>70</sup> Rule 2 merged actions at law and equity into one civil action.<sup>71</sup> However, the FRCP "did not enlarge the Seventh Amendment right,"<sup>72</sup> nor did they "abolish the historic distinction between legal and equitable actions,"<sup>73</sup> because Congress expressly mandated in the REA that the FRCP "shall neither abridge, enlarge, nor modify the substantive rights of any litigant."<sup>74</sup> Although the FRCP "do not set up a self-contained test for matters triable to a jury, [they] expressly adopt the constitutional test either by direct reference or by a simple reference to history."<sup>75</sup> Rule 38(a) speaks squarely to the jury trial issue, conveying that courts should not interpret the FRCP as expanding the right to jury trial beyond the Seventh Amendment's guarantee or any existing statutory grants: "The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate."<sup>76</sup> By its terms, "this Rule, like the [Seventh] Amendment itself, neither restricts nor enlarges the right to jury trial."<sup>77</sup>

Even after the enactment of the FRCP, therefore, the historic distinction between law and equity "still governs the availability of a trial by jury."<sup>78</sup> If a suit was cognizable as an action at law prior to the

69. Rules Enabling Act of 1934, Pub. L. No. 73-415, ch. 651, § 1-2, 48 Stat. 1064 (current version at 28 U.S.C. § 2072 (2006)).

70. *E.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 595 n.14 (2007) (Stevens, J., dissenting); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 371 (1981) (Rehnquist, J., dissenting); *see also* McDOWELL, *supra* note 40, at 92 ("In 1938 the Court formally adopted one system of civil procedure, merging proceedings at law with proceedings at equity, and promulgated the new Rules of Civil Procedure.").

71. FED. R. CIV. P. 2. "Rule 2 provides that there shall be but one form of [civil] action." *Black v. Boyd*, 248 F.2d 156, 163 (6th Cir. 1957).

72. *Brennan v. J.C. Penney Co.*, 61 F.R.D. 66, 68 (N.D. Ohio 1973). The drafters of the unified procedures embodied in the FRCP "took a neutralist position with respect to jury trial." James, *supra* note 9, at 667.

73. *Black*, 248 F.2d at 161; *see also* *Raillex Corp. v. Joseph Guss & Sons, Inc.*, 40 F.R.D. 119, 123 (D.D.C. 1966), *aff'd*, 382 F.2d 179 (D.C. Cir. 1967) ("[The FRCP] abolishes only the procedural distinctions but not the substantive distinctions between law and equity."); *Conn v. Kohlemann*, 2 F.R.D. 514, 516 (E.D. Pa. 1942) ("While . . . the adoption of the Federal Rules of Civil Procedure . . . have abolished any distinction in procedure between law and equity, they have not abolished the distinction between legal and equitable remedies."). Understandably, however, when the enhanced procedural possibilities of the merged system (e.g., the ability to seek all relief in a single action) "is coupled with a constitutional guaranty of jury trial geared to the old system, and a decision not to extend the scope of jury trial, complex problems arise." James, *supra* note 9, at 665.

74. Rules Enabling Act of 1934, ch. 651, § 1 (current version at 28 U.S.C. § 2072(b) (2006)).

75. James, *supra* note 9, at 667.

76. FED. R. CIV. P. 38(a).

77. *Ross v. Bernhard*, 396 U.S. 531, 543-44 (1970) (Stewart, J., dissenting).

78. *Brennan v. J.C. Penney Co.*, 61 F.R.D. 66, 68 (N.D. Ohio 1973); *see Ross*, 396 U.S. at 531, 543-44 ("[A]fter the promulgation of the Federal Rules, as before, the constitutional right to a jury

adoption of the FRCP, “it remained so under the Rules and is triable by jury as of right.”<sup>79</sup> If an action was “equitable by nature, it remained so and is not triable by jury as of right.”<sup>80</sup> Hence the REA’s directive that the FRCP “shall neither abridge, enlarge, nor modify the substantive rights of any litigant.”<sup>81</sup> Subsequent congressional enactments echo this mandate.<sup>82</sup> In the Seventh Amendment context, the significance of this is that the FRCP and the merger of the law and equity into a single procedural regime did not expand the scope of the substantive right to jury trial at English common law as of 1791.<sup>83</sup> A corollary to this proposition is that, “[n]otwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive principles of Courts of Chancery remain unaffected.”<sup>84</sup>

### E. THE MODERN CLASS ACTION SUIT UNDER FRCP 23

FRCP 23, which governs the procedure for class action suits, originally emerged in 1938 as part of the Court’s adoption of a unified system of civil procedure.<sup>85</sup> Seeking to “encourage more frequent use of class actions,” FRCP 23 divided class suits into three categories of legal relations, defined by the character of the right at issue: (1) true, (2) hybrid, and (3) spurious class actions.<sup>86</sup> However, these original

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trial attaches only to suits at common law.”); *see also* *Black*, 248 F.2d at 161–62 (holding that under the FRCP’s procedural regime, the inquiry is still whether the action at issue is a “suit at common law in which the right of trial by jury is guaranteed by the Seventh Amendment, or is an equitable action in which trial by jury is not a matter of right”).

79. *Black*, 248 F.2d at 161–62.

80. *Id.*

81. Rules Enabling Act of 1934, Pub. L. No. 73-415, ch. 651, § 1, 48 Stat. 1064 (current version at 28 U.S.C. § 2072(b) (2006)).

82. *See id.* ch. 646, § 2072, 62 Stat. 961 (1948) (codified as amended at 28 U.S.C. § 2072 (2006)) (stating that the Supreme Court’s rulemaking power shall “not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution”).

83. *See Ross*, 396 U.S. at 544 (“I take this plain, simple, and straightforward language to mean that after the promulgation of the Federal Rules, as before, the constitutional right to a jury trial attaches only to suits at common law.”); *see also* *Raillex Corp. v. Joseph Guss & Sons, Inc.*, 40 F.R.D. 119, 123 (D.D.C. 1966), *aff’d*, 382 F.2d 179 (D.C. Cir. 1967) (“The substantive distinctions between legal and equitable rights and remedies are still applicable in the Federal Courts, particularly with regard to the constitutional right to trial by jury ‘in [s]uits at common law’ declared by the Seventh Amendment.”).

84. *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 382 n.26 (1949).

85. *See, e.g., In re Teletronics Pacing Sys., Inc.*, 186 F.R.D. 459, 471 (S.D. Ohio 1999).

86. *See* 7A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 1752, at 16–17 (2d ed. 1986). These were merely how the categories came to be known; the original FRCP 23 expressly described them as “(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it; (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.” *Id.*

groupings proved problematic and courts struggled to classify the facts of cases within the strict categories.<sup>87</sup> Perhaps more importantly, it remained unclear whether the categorical labels had any functional impact on the application of the rule.<sup>88</sup> Therefore, a 1966 amendment<sup>89</sup> to FRCP 23 completely revised and augmented the original scheme to create a more practical approach to representation litigation.<sup>90</sup>

First, the new FRCP 23 set forth four prerequisites for certifying a suit:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.<sup>91</sup>

These prerequisites are more commonly referred to as the requirements of (1) numerosity, (2) commonality, (3) typicality and (4) adequacy of representation.<sup>92</sup> Second, the 1966 amendment to FRCP 23 established three clear categories under which a judge may certify a class: (1) FRCP 23(b)(1), where numerous separate suits would lead to contradictory standards of conduct for the party opposing the class; (2) FRCP 23(b)(2), where numerous individual suits would impede or substantially impair individual class members' interests; and (3) FRCP 23(b)(3), where common questions of law or fact for the class predominate over any individual issues and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."<sup>93</sup> In contrast to the original FRCP 23, which segregated classes by the right at issue, the new FRCP 23 categorized classes based on the remedy sought. FRCP 23(b)(1) and (2) afford class action status to cases that call for a single adjudication, such as where there is a limited fund to satisfy all claims or "[w]hen the party opposing a class ha[s] acted on grounds apparently applying to the whole group."<sup>94</sup> Actions falling into these two categories generally require a form of equitable relief such as an injunction or a declaratory judgment.<sup>95</sup> In contrast, FRCP 23(b)(3) affords class action status to suits seeking money damages that involve

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87. *Id.*

88. *Id.*

89. Act of Nov. 6, 1966, Pub. L. No. 89-773, § 1, 80 Stat. 1323 (codified as amended at 28 U.S.C. § 2072).

90. WRIGHT ET AL., *supra* note 86.

91. FED R. CIV. P. 23(a).

92. *See, e.g.*, Evans v. IAC/Interactive Corp., 244 F.R.D. 568, 574-80 (C.D. Cal. 2007).

93. FED R. CIV. P. 23(b)(3).

94. Kaplan, *supra* note 19, at 389.

95. Lawrence J. Restieri, Jr., Note, *The Class Action Dilemma: The Certification of Classes Seeking Equitable Relief and Monetary Damages After Ticor Title Insurance Co. v. Brown*, 63 FORDHAM L. REV. 1745, 1759 (1995).

common questions and satisfy the certification prerequisites.<sup>96</sup> A suit seeking monetary relief is historically cognizable as a claim for legal relief.<sup>97</sup> Because such a suit typically involves a less unitary adjudication,<sup>98</sup> it “does not as readily call for class-action treatment as do those certified under Rules 23(b)(1) and (2).”<sup>99</sup> Still, the 1966 amendment created this category because sometimes “the facts of the case dictate that a class action is the most desirable procedural device” for a suit seeking money damages.<sup>100</sup> For example, a suit that “concerns numerous plaintiffs with small claims . . . would not be economical” if brought individually.<sup>101</sup> As a class, however, “the total damage claim makes [the] suit feasible” to proceed.<sup>102</sup>

It may be tempting to read the 1966 amendment to FRCP 23 as bringing the constitutional jury trial right into the class action context. After all, the relief of money damages is historically cognizable as a claim for legal relief that might implicate a corresponding constitutional jury trial right.<sup>103</sup> But the fact that suits certified under FRCP 23(b)(3) seek the legal relief of money damages does not accord such suits non-equitable status granting the right to jury trial. FRCP 23(b)(3) suits for money damages still take the form of a class action, which is equitable by nature and not jury triable as of right.<sup>104</sup> Moreover, as noted above, the REA—by its plain terms—precludes the enlargement or modification of a substantive right through the promulgation of the FRCP.<sup>105</sup> On a more basic level, FRCP 23(b)(3) was designed to segregate money damages suits from (b)(1) or (b)(2) suits to satisfy specific procedural concerns.<sup>106</sup> Specifically, as FRCP 23(b)(3) suits “do not as readily require a unitary adjudication as do those under (b)(1) or (2),” class members in (b)(3) suits may opt out of the suit to pursue individual actions.<sup>107</sup> FRCP 23 does not provide members of (b)(1) and (2) classes with the opportunity to

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96. William D. Henderson, Comment, *Reconciling the Judicial Links Doctrine with the Federal Rules of Civil Procedure and Article III*, 67 U. CHI. L. REV. 1347, 1353 (2000) (“Rule 23(b)(3) allows a class to adjudicate monetary claims where common issues predominate.”).

97. See, e.g., *Chauffeurs v. Terry*, 494 U.S. 558, 573–74 (1990).

98. See Restieri, *supra* note 95, at 1759–60 (“Because the only element that (b)(3) class members have in common is the claim, (b)(3) classes are often said to be not as ‘cohesive’ as those under (b)(1) or (2).” (quoting FED. R. CIV. P. 23(d)(2) advisory committee’s note to 1966 amendments)).

99. *Id.* at 1759; see FED. R. CIV. P. 23(b)(3) advisory committee’s note to 1966 amendments.

100. Restieri, *supra* note 95, at 1759; see FED. R. CIV. P. 23(b)(3) advisory committee’s note to 1966 amendments.

101. Restieri, *supra* note 95, at 1760.

102. *Id.*

103. See, e.g., *Chauffeurs v. Terry*, 494 U.S. 558, 573–74 (1990) (noting that “money damages . . . are the type of relief traditionally awarded by courts of law” and thus constitute a basis in certain contexts for “Seventh Amendment entitle[ment] . . . to a jury trial”).

104. See, e.g., *Black v. Boyd*, 248 F.2d 156, 161–62 (6th Cir. 1957).

105. See *supra* Part I.D.

106. See Henderson, *supra* note 96, at 1353.

107. Restieri, *supra* note 95, at 1746–47.



opt out; instead, members of those classes are bound by the judgment rendered for or against the class.<sup>108</sup> The 1966 amendment segregated FRCP 23(b)(3) classes from other classes to procedurally safeguard (b)(3) class members.<sup>109</sup> Specifically, the amended FRCP 23 requires that absentee members of (b)(3) classes “be provided with notice that the class action concerns them and an opportunity to opt out of the suit.”<sup>110</sup> This does not mean, however, that the 1966 amendments were designed to expand the right to jury trial and cancel out the equitable nature of the group litigation vehicle. As the Court itself has held, “[n]otwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive principles of Courts of Chancery remain unaffected.”<sup>111</sup> This analysis is consistent with the directive of the REA.<sup>112</sup> In fact, the Court itself has declared that “Rule 23’s requirements must be interpreted in keeping with . . . the Rules Enabling Act, which instructs that rules of procedure ‘shall not abridge, enlarge or modify any substantive right.’”<sup>113</sup> As the substantive right to jury trial at English common law in 1791 did not extend to class action suits, the use of the class action form in FRCP 23(b)(3) money damages suits takes such suits outside the Seventh Amendment’s jury trial right.<sup>114</sup>

## II. SUPREME COURT JURISPRUDENCE BEFORE AND AFTER THE 1938 ADOPTION OF THE FEDERAL RULES OF CIVIL PROCEDURE

The interplay between a pair of Supreme Court cases—one from before and one from after 1938—considering the intersection of equity jurisdiction with the Seventh Amendment illustrates how, contrary to their design, the FRCP served as a catalyst for the Court to expand the scope of the Seventh Amendment’s jury trial right. One of the consequences of this line of Supreme Court jurisprudence was the proposition reflected in *Ortiz* that the Seventh Amendment entitles class suit litigants to a jury trial.

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108. See FED. R. CIV. P. 23(b)(1)–(2).

109. See Henderson, *supra* note 96, at 1353.

110. Restieri, *supra* note 95, at 1760.

111. Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 382 n.26 (1949).

112. See *supra* Part I.D.

113. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 612–13 (1997) (quoting 28 U.S.C. § 2072(b) (2006)).

114. See Ross v. Bernhard, 396 U.S. 531, 544 (1970) (Stewart, J., dissenting) (“I take this plain, simple, and straightforward language to mean that after the promulgation of the Federal Rules, as before, the constitutional right to a jury trial attaches only to suits at common law.”); see also *Raillex Corp. v. Joseph Guss & Sons, Inc.*, 40 F.R.D. 119, 123 (D.C. Cir. 1967), *aff’d*, 382 F.2d 179 (D.C. Cir. 1967) (“The substantive distinctions between legal and equitable rights and remedies are still applicable in the Federal Courts, particularly with regard to the constitutional right to trial by jury ‘in [s]uits at common law’ declared by the Seventh Amendment.”).

A. *AMERICAN LIFE INSURANCE CO. v. STEWART*

*American Life Insurance Co. v. Stewart*<sup>115</sup> provides a reasonable representation of the law as it regarded the distinction between and overlap of equitable and legal jurisdiction, just prior to the adoption of the FRCP.<sup>116</sup> In *Stewart*, an insurance corporation filed suit in federal district court seeking the cancellation of two insurance policies on the basis of fraudulent representations made by the insured in the application for the policies.<sup>117</sup> By their terms, the policies would have become incontestable “two years from [the] date of issue.”<sup>118</sup> The suit sought injunctive relief and was cognizable in equity.<sup>119</sup> The beneficiaries of the policies brought suit in the same court for recovery of the insurance, a damages action cognizable at law.<sup>120</sup> The insurance company sued to enjoin prosecution of the policyholders’ action at law.<sup>121</sup> Consistent with precedent for the integration of claims in such a circumstance,<sup>122</sup> the parties signed a stipulation for the court to try the suit in equity before trying the action at law.<sup>123</sup> A corollary to the integration of the claims was that in hearing the suit for injunctive relief under equity first, the court’s finding on the critical factual issue of the case—whether there was a material misrepresentation in the issuance of the insurance policies—would be conclusive.<sup>124</sup> In other words, if the court sitting in equity—the chancellor—were to grant the injunction,

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115. 300 U.S. 203 (1937).

116. When it was decided, *Stewart* did not entirely reflect the law’s perspective of legal and equitable jurisdiction because, at the time, there was varying enthusiasm for the jury. By 1938, enthusiasm for the jury had decreased, partly because of the growing scope and complexity of litigation. See Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15, 15–19 (1990). Cases in equity could be adjudicated solely by the judge if the judge so chose, which many often did. See Richard L. Marcus, *Completing Equity’s Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725, 735–36 (1989).

117. *Stewart*, 300 U.S. at 211.

118. *Id.* at 210 (internal quotation marks omitted).

119. *Id.* at 210–11; see also JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 1337–38 (Students’ ed. 1907) (describing the nature and purpose of injunctive relief, as well as the fundamental principles).

120. *Stewart*, 300 U.S. at 211.

121. *Id.*

122. In such situations, the chancellor, or the court sitting in equity, “could either retain the case on the docket until the insurer’s fraud defense was actually tried by the jury in the law action or enjoin prosecution of the law action and try the fraud issue itself.” John J. Watkins, *The Right to Trial by Jury in Arkansas After Merger of Law and Equity*, 24 U. ARK. LITTLE ROCK L. REV. 649, 671–72 (2002). In *Stewart*, the trial judge elected to pursue the latter course and, pursuant to the parties’ stipulation, sat in equity on the issue of whether there was a fraudulent misrepresentation. 300 U.S. at 211.

123. *Stewart*, 300 U.S. at 211. The stipulation provided that “the issues in said law action shall in the meantime be made up in order that said law issues thus joined shall stand ready for trial, with the understanding that said law issues, if any remain for trial, shall be tried as soon after the trial of the suit in equity as the court shall determine.” *Id.* (internal quotation marks omitted).

124. *Id.*; see Watkins, *supra* note 122, at 671–72.

“issues that would have otherwise been litigated at law by a jury would [also] be decided by the chancellor.”<sup>125</sup> In *Stewart*, after “trial of the suits in equity,” the district court found that the representations in the policies were fraudulent, and “decreed the cancellation and surrender of the policies.”<sup>126</sup>

The Supreme Court upheld the trial judge’s ruling. It rejected the beneficiaries’ argument on appeal that their suit at law should have displaced the trial court’s initial jurisdiction in equity because the action at law provided the insurance company with a remedy at law.<sup>127</sup> With Justice Cardozo writing for a unanimous Court, the *Stewart* Court held: “[T]he settled rule is that equitable jurisdiction existing at the filing of a bill is not destroyed because an adequate legal remedy may have become available thereafter.”<sup>128</sup> Functionally, this rule meant that as “[a] court has control over its own docket,” it could exercise its “sound discretion” and “hold one lawsuit in abeyance to abide the outcome of another, especially where the parties and the issues are the same.”<sup>129</sup> *Stewart* stood for the notion that where legal and equitable issues overlapped in a suit, co-extensive authority in equity and at law meant that whichever suit was filed first was determinative.<sup>130</sup> Under the established law at the time of *Stewart*, therefore, even where a legal remedy later became available, a court sitting in equity could still retain its equitable jurisdiction and determine the entire dispute within a single case and a single court.<sup>131</sup> Further, where, as in *Stewart*, an equity court employed procedural devices of this nature, the case was considered to be “outside the scope of the jury trial right,” meaning that parties like the beneficiaries in *Stewart* were not denied the Seventh Amendment’s jury trial right.<sup>132</sup>

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125. *Watkins*, *supra* note 122, at 671.

126. 300 U.S. at 211.

127. *Id.* at 215–16. The available remedy at law would have been the defense of fraud on the beneficiaries’ policies. *See Watkins*, *supra* note 122, at 671–72. The absence of an adequate remedy at law is a prerequisite for equitable jurisdiction. *See infra* note 177 and accompanying text. The *Stewart* Court, however, noted that the beneficiaries’ answers to the insurance company’s bills of equity “did not state that the remedy at law was adequate.” *Stewart*, 300 U.S. at 211.

128. 300 U.S. at 215.

129. *Id.*

130. *See id.* at 215–16. An additional consequence of the approach embodied in *Stewart* is that where a judge sitting in equity makes a finding of disputed fact, such a finding would be dispositive for a common issue of fact falling under the tradition of law. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 503–04 (1959).

131. *See Stewart*, 300 U.S. at 215–16.

132. Hazard, *supra* note 9, at 1687. Under established law at the time of *Stewart*, procedural devices such as the one employed by the trial judge sitting in equity were part of the “received lore and procedural possibility concerning the broad scope of equity” and “the correspondingly broad scope of a judge’s authority to decide fact issues.” *Id.*

B. *BEACON THEATRES, INC. v. WESTOVER*

Representing a sea change in Supreme Court jurisprudence, *Beacon Theatres, Inc. v. Westover* not only reversed the holding of *Stewart*, but also cut against the grain of the established decisional law of the time.<sup>133</sup> *Stewart* embodied the default principle for allocating authority “as between the ‘law side’ of the court, acting through a jury, and the ‘equity side,’ acting through the judge alone.”<sup>134</sup> A judge sitting in equity could try all factual issues without a jury.<sup>135</sup> As an exception to this principle, only where the issues within an action consisted “solely of a distinctively common-law claim” was a jury trial required.<sup>136</sup> *Beacon Theatres* reversed the then-extant default principle and announced a new standard whereby “all issues of fact are to be tried by a jury except issues subsumed under a distinctively equitable claim.”<sup>137</sup> In announcing the new standard, the Supreme Court set its jurisprudence on a course that, among other things, culminated in the notion embodied in *Ortiz* that the Seventh Amendment affords a jury trial right to litigants in class suits under FRCP 23.<sup>138</sup>

In *Beacon Theatres*, Fox West Coast Theatres sued for declaratory judgment against Beacon Theatres, seeking judicial pronouncement that its exclusivity contracts with film distributors were not violative of pertinent antitrust laws.<sup>139</sup> Fox’s suit also sought injunctive relief to prohibit Beacon from initiating a threatened suit for antitrust violations against Fox or its distributors, pending the declaratory relief action.<sup>140</sup> Beacon counterclaimed against Fox, alleging a conspiracy between Fox and its distributors to “monopolize first-run pictures in violation of the antitrust laws” and demanding money damages and a jury trial.<sup>141</sup> In spite of Beacon’s jury trial demand, the district judge viewed Fox’s claim as raising issues essentially equitable in nature.<sup>142</sup> The district judge ordered trial of those issues—including critical common issues raised by Beacon in its counterclaim<sup>143</sup>—to the court sitting in equity prior to any jury

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133. 359 U.S. 500, 514–15 (1959) (five-to-three decision) (Stewart, J., dissenting); Hazard, *supra* note 9, at 1687–88.

134. Hazard, *supra* note 9, at 1687–88.

135. *Id.*

136. *Id.* at 1688.

137. *Id.*

138. See *infra* Part II.F.

139. 359 U.S. at 502 (majority opinion). The contracts conferred on Fox the exclusive right to show first-run feature films for a particular period of time in a specified geographical area. *Id.*

140. *Id.* at 502–03.

141. *Id.* at 503.

142. *Id.*

143. Critical common issues included whether the exclusive rights that the film distributors had conferred on Fox were reasonable, and whether Fox and Beacon were indeed in competition. *Id.* at 503–04.

determination of the remaining issues in Beacon's counterclaim.<sup>144</sup> An effect of this order was to deny Beacon a jury trial, even though Beacon otherwise would have been entitled to have a jury hear its legally cognizable claims.<sup>145</sup>

On appeal, the Ninth Circuit affirmed.<sup>146</sup> It took the view that as Fox sought declaratory and injunctive relief, its suit was "traditionally cognizable in equity."<sup>147</sup> Fox's claims presented equitable issues because Fox filed suit while facing Beacon's threatened interference with its rights under the exclusivity agreements, and Fox lacked an adequate legal remedy.<sup>148</sup> Equity jurisdiction attached upon the filing of Fox's complaint.<sup>149</sup> Therefore, the district court properly invoked the principle that a party like Fox, who "is entitled to maintain a suit in equity for an injunction [or declaratory relief.] . . . may have all the issues in his suit determined by the judge without a jury regardless of whether legal rights are involved."<sup>150</sup> The Ninth Circuit relied on *Stewart's* holding that in such circumstances an equity court has the "discretion to enjoin the later lawsuit in order to allow the whole dispute to be determined in one case in one court."<sup>151</sup> It thus held that the district court did not abuse its discretion in trying Fox's equitable cause first.<sup>152</sup>

In a five-to-three decision authored by Justice Black, the Supreme Court reversed.<sup>153</sup> The Court conceded that Fox's complaint validly pled for equitable relief.<sup>154</sup> Still, the Court held that the district court's

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144. *Id.*

145. *Id.* On appeal, the Ninth Circuit noted that the effect of the district court's action could be to limit Beacon's "opportunity fully to try to a jury every issue which has a bearing upon its treble damage suit," meaning that a determination of an issue by the district court might "operate either by way of res judicata or collateral estoppel so as to conclude both parties with respect thereto at the subsequent trial of the treble damage claim." *Id.* at 504 (quoting *Beacon Theatres, Inc. v. Westover*, 252 F.2d 864, 874 (9th Cir. 1958), *rev'd*, 359 U.S. 500 (1959)) (internal quotation marks omitted).

146. *Id.* at 504-05.

147. *Id.* at 505.

148. *Id.* at 505-06.

149. *Id.* at 505.

150. *Id.* (discussing the Ninth Circuit's reasoning that as the district court was sitting in equity, it could retain equity jurisdiction even though a legal remedy for Fox might later have become available as a defense against Beacon's counterclaim); *see also* *Davis v. Wakelee*, 156 U.S. 680, 688 (1895) ("It is a settled principle of equity jurisprudence that, if the remedy at law be doubtful, a court of equity will not decline cognizance of the suit.").

151. *Beacon Theatres*, 359 U.S. at 505. The Ninth Circuit found no violation of the Seventh Amendment because prior to the FRCP's merger of law and equity, a chancellor could have effected the same result. *Beacon Theatres, Inc. v. Westover*, 252 F.2d 864, 874, 875 (9th Cir. 1958), *rev'd*, 359 U.S. 500 (1959) ("[T]he Rules of Civil Procedure . . . were not designed to make any substantial change in the right to jury trial or to alter any pre-existing right of the trial judge to determine in his discretion whether trial of the suit in equity shall be prior to the submission of the issues in the legal action in any case where, as here, both types of action are presented by the pleadings.").

152. *Beacon Theatres*, 359 U.S. at 505.

153. *Id.* at 511. Justice Frankfurter took no part in the consideration or decision. *See id.*

154. *Id.* at 506-08.

decision to hear the equitable issues raised in Fox's claims—and any common issues raised in Beacon's counterclaim—prior to a jury determination of the legal issues raised by Beacon amounted to a denial of Beacon's right to jury trial.<sup>155</sup> Justice Black's majority opinion took the view that the FRCP and the Declaratory Judgment Act<sup>156</sup> had expanded the provision of adequate remedies at law.<sup>157</sup> As injunctive or declaratory relief had always been based on the inadequacy of legal remedies, therefore, the expanded reach of legal remedies "necessarily affect[ed] the scope of equity."<sup>158</sup> Justice Black's majority opinion also questioned the continued viability of equitable remedies, given the "liberal joinder provisions of the Federal Rules which allow legal and equitable causes to be brought and resolved in one civil action."<sup>159</sup> The discretion of a court sitting in equity to decide accompanying legal issues now should be "very narrowly limited . . . to preserve jury trial."<sup>160</sup> The district court, therefore, was not permitted to deprive Beacon of the right to jury trial simply because Fox sued first for declaratory relief, an equitable remedy.<sup>161</sup> Accordingly, the Court held that "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules [the Court] cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."<sup>162</sup> Under the Court's holding, in a case with both legal and equitable elements, litigants have a right to jury trial, even if the equitable element clearly predominates.<sup>163</sup> In such a circumstance, therefore, a trial court cannot deprive a litigant of his right to jury trial on the legal issues by scheduling the trial to first dispose of its equitable issues.<sup>164</sup>

In a dissent joined by Justices Harlan and Whittaker, Justice Stewart argued that no denial of a "clear constitutional" jury trial right had

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155. *Id.*

156. In pertinent part, the Declaratory Judgment Act provides, "In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a) (2006); *see also* FED. R. Civ. P. 57 ("These rules govern the procedure for obtaining a declaratory judgment under 28 U.S.C. § 2201. . . . The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory-judgment action.").

157. *Beacon Theatres*, 359 U.S. at 508–10.

158. *Id.* at 509. While the FRCP and Declaratory Judgment Act indeed effected substantial procedural reform, namely by expanding the available legal remedies, they still maintained the distinction between jury and non-jury issues and left substantive rights unchanged. *See id.* at 514–15 (Stewart, J., dissenting).

159. *Id.* at 509.

160. *Id.* at 510.

161. *Id.* at 504.

162. *Id.* at 510–11 (footnote omitted).

163. *See id.* at 506–11.

164. *See id.*

occurred in the case.<sup>165</sup> “The district judge simply exercised his inherent discretion”—explicitly granted in the FRCP—“to schedule the trial of an equitable claim in advance of an action at law.”<sup>166</sup> Invoking the *Stewart* Court’s characterization of this discretion as an established principle, Justice Stewart noted that the FRCP did not alter this principle, but rather expressly affirmed it through Rule 42(b).<sup>167</sup> The dissent criticized the Court for “disregard[ing] the historic relationship between equity and law,”<sup>168</sup> and for reading the FRCP as expanding legal remedies and stripping the district courts of their equitable jurisdiction and traditional control over their dockets.<sup>169</sup> However, “obviously the Federal Rules could not and did not expand the substantive law one whit.”<sup>170</sup> The historic principles governing the right to jury trial remained unchanged.<sup>171</sup> According to the dissent, if the issues presented in a suit appear in a context traditionally cognizable in equity, the right to jury trial does not attach; conversely, where those issues would be traditionally cognizable at common law, the Seventh Amendment would guarantee the right to jury trial, according to the dissent.<sup>172</sup>

Justice Stewart’s dissent, likewise, criticized the Court for holding that by counterclaiming, *Beacon* “acquired a right to trial by jury of issues which otherwise would have been properly triable to the court.”<sup>173</sup> This holding constituted a “marked departure from long-settled principles” articulated in *Stewart* that the existence of equitable jurisdiction is not destroyed merely because an adequate legal remedy later becomes available.<sup>174</sup> Moreover, the longstanding notion that the

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165. *Id.* at 511.

166. *Id.* FRCP 42(b) provides the trial court with the discretion to order separate trials: “For convenience, to avoid prejudice, or to expedite or economize, the court may order a separate trial of one or more separate issues, claims, cross claims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.” FED. R. CIV. P. 42(b); *see also* FED. R. CIV. P. 57 (“The court may order a speedy hearing of a declaratory-judgment action.”). Here, as “the allegations of the complaint entitled Fox to equitable relief,” a declaration of rights unsupported by injunctive relief might not have provided Fox with adequate protection. *Beacon Theatres*, 359 U.S. at 517 (Stewart, J., dissenting).

167. *Beacon Theatres*, 359 U.S. at 517–19. FRCP 42(b) maintains that the trial of legal and equitable claims in the same proceeding is possible and expressly affirms the trial judge’s power to determine the order in which the court hears claims. *See* FED. R. CIV. P. 42(b). Likewise, FRCP 42(a)(1) explicitly provides the trial judge with the authority to “join for hearing or trial any or all matters at issue in [multiple] actions” (or “consolidate the actions”), if the actions consist of a common issue of fact or law. FED. R. CIV. P. 42(a)(1)–(2).

168. *Beacon Theatres*, 359 U.S. at 514.

169. *Id.* 518.

170. *Id.* (internal quotation marks omitted).

171. *Id.* at 514–15 (arguing that the Declaratory Judgment Act merely created a new remedy “available in the areas of both equity and law”).

172. *Id.*

173. *Id.* at 516; *see also id.* at 519 (stating that *Beacon*’s counterclaim “could not be held to have transformed Fox’s original complaint into an action at law”).

174. *Id.* at 517; *see also* *Davis v. Wakelee*, 156 U.S. 680, 688 (1895) (“Where equity can give relief

exercise of equitable jurisdiction is appropriate only when legal remedies are inadequate was not traditionally employed as a restriction upon an equity court's exercise of power.<sup>175</sup> The dissent argued that the majority's opinion contorted this principle.<sup>176</sup> In conclusion, Justice Stewart reminded the Court how "the Federal Rules were not intended to undermine the basic structure of equity jurisprudence, developed over the centuries and explicitly recognized in the United States Constitution."<sup>177</sup>

### C. THE AFTERMATH OF *BEACON THEATRES*

As Justice Stewart's dissent articulates, the suit at issue in *Beacon Theatres*—Fox's complaint seeking declaratory judgment and injunctive relief—was plainly and properly cognizable in equity.<sup>178</sup> Accordingly, *Stewart* should have controlled, and the Court should have affirmed the propriety of the trial judge's decision to hear the suit sitting in equity, in spite of the fact that *Beacon Theatres*'s counterclaim subsequently raised issues at law. At most, the Court in *Beacon Theatres* should have couched its decision in terms of an abuse of discretion by the district court in deciding to hear the equitable claim first.<sup>179</sup> Instead, Justice Black's majority opinion held the contrary.<sup>180</sup>

The Court's nearly unequivocal language did not merely depart from established law. It also enlarged the scope of the right to jury trial.<sup>181</sup> This was unjustified, in light of the REA and the FRCP. Recall that the REA explicitly stated that FRCP "shall neither abridge, enlarge, nor modify the substantive rights of any litigant."<sup>182</sup> The result in *Beacon*

plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law.").

175. *Beacon Theatres*, 359 U.S. at 517–18; see also JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §§ 17–20 (3d English ed. 1920) (describing the nature of equity courts with respect to administering remedies for rights not recognized by courts of common law). In keeping with Justice Stewart's characterization, section 16 of the Judiciary Act of 1789 provided, "That suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law." Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73, 82 (1789).

176. *Beacon Theatres*, 359 U.S. at 517 (arguing the majority's opinion suggests that merely "because it is possible under the counterclaim to have a jury trial of the factual issue of substantial competition, that issue *must* be tried by a jury, even though the issue was primarily presented in the original claim for equitable relief" (emphasis added)).

177. *Id.* at 519.

178. *See id.* at 513.

179. *See James, supra* note 9, at 687 ("Fox may have been simply trying to circumvent *Beacon*'s jury right by 'jumping the gun' with an equitable action; the district court's exercise of discretion may have been so questionable as to border on abuse.").

180. *Beacon Theatres*, 359 U.S. at 510–11 (majority opinion).

181. *James, supra* note 9, at 687 (noting how the Court's "decision represented an *extension* of [the] jury trial right").

182. Rules Enabling Act of 1934, Pub. L. No. 73-415, § 1, 48 Stat. 1064 (current version at 28 U.S.C. § 2072(b) (2006)). Recall also that FRCP 38(a) expressly restricts courts from interpreting the FRCP as expanding the right to jury trial beyond the Seventh Amendment's guarantee. FED. R. CIV. P. 38(a) ("The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as



*Theatres* was also unjustified given its factual similarity to *Stewart*.<sup>183</sup> Perhaps more importantly, the grounds given by the *Beacon Theatres* Court left its decision "susceptible [to] an interpretation which would go far to abolish the historical test altogether and extend jury trial over most of the former domain of equity."<sup>184</sup> Thoroughly breaking with the Court's prior decisions, *Beacon Theatres* stood for a new principle whereby "[a]ll claims in which the remedy was monetary compensation, or which could otherwise be assimilated to a claim at common law, were held to be within the realm of trial by jury."<sup>185</sup> Accordingly, the lower federal courts have applied *Beacon Theatres* beyond its simple fact pattern, where the defendant was asserting a compulsory, legal counterclaim in response to the plaintiff's claim for equitable relief.<sup>186</sup> The distortion introduced in *Beacon Theatres* also laid the groundwork for the Court's position in *Ortiz*, that the right to jury trial is an ingredient to class action suits.<sup>187</sup> This is despite the fact that the class suit, like the suits for injunctive relief in *Stewart* and *Beacon Theatres*, is a creature of equity and does not implicate a constitutional right to jury trial. The Supreme Court arrived at this stance through a series of decisions that followed *Beacon Theatres*.

#### D. *DAIRY QUEEN, INC. v. WOOD*

In *Dairy Queen, Inc. v. Wood*, with Justice Black again writing the majority opinion, the Court expanded *Beacon Theatres* by holding that a suit for an accounting—which had traditionally been cognizable in equity—was cognizable under law, based on the rationale that an accounting is ultimately a demand for monetary relief and money damages are legal in nature.<sup>188</sup> In *Dairy Queen*, the owners of the

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provided by a federal statute—is preserved to the parties inviolate.”).

183. See *Beacon Theatres*, 359 U.S. at 514–15 (Stewart, J., dissenting); Hazard, *supra* note 9, at 1687–88.

184. James, *supra* note 9, at 687.

185. Hazard, *supra* note 9, at 1688.

186. Watkins, *supra* note 122, at 679. To illustrate this point, Watkins notes that courts have reached an equivalent result where the defendant's counterclaim is permissive, and that courts have held that a right to jury trial exists on the common issues where the plaintiff makes a legal claim and the defendant's affirmative defense is "cognizable only in equity." *Id.* Watkins also provides an example of courts utilizing *Beacon Theatres*'s rationale where the plaintiff brings both legal and equitable claims that have common factual issues. *Id.* at 679–80.

187. See *infra* Part II.F.

188. 369 U.S. 469, 477–78 (1962). The Court indicated that in order for a plaintiff like the trademark owners to maintain a suit for an accounting under equity, "the plaintiff must be able to show that the 'accounts between the parties' are of such a 'complicated nature' that only a court of equity can satisfactorily unravel them." *Id.* at 478 (quoting *Kirby v. Lake Shore & Mich. S. R.R.*, 120 U.S. 130, 134 (1887)). The Court noted, however, that in light of the power the FRCP gives to district courts, "the burden of such a showing is considerably increased and it will indeed be a rare case in which it can be met." *Id.* at 478 (noting that under FRCP 53(b), the trial judge may "appoint masters to assist the jury in those exceptional cases where the legal issues are too complicated for the jury adequately to handle alone").

trademark “Dairy Queen” brought suit for breach of a licensing agreement against the licensee of the trademark, seeking a declaratory judgment that the contract was void, an accounting for the licensee’s unlawfully obtained profits, a judgment for money damages in that amount, and a permanent injunction for restraint on the licensee’s use of the trademark.<sup>189</sup> The district court rejected the licensee’s jury trial demand, finding the owners’ case to be “purely equitable” or, at a minimum, a suit in equity consisting of “a claim to injunctive relief coupled with an incidental claim for damages.”<sup>190</sup>

The Supreme Court reversed,<sup>191</sup> holding that the fact that the suit seeks an accounting does not by itself make the suit cognizable in equity because “the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings.”<sup>192</sup> The Court, therefore, held that the right to jury trial could not be “lost as to legal issues [even] where those issues are characterized as ‘incidental’ to equitable issues.”<sup>193</sup> Justice Black’s opinion directly relied on *Beacon Theatres*’s holding: “The necessary prerequisite to the right to maintain a suit for an equitable accounting, like all other equitable remedies, is, as we pointed out in *Beacon Theatres*, the absence of an adequate remedy at law.”<sup>194</sup> Moreover, the *Dairy Queen* Court described *Beacon Theatres* as having “settled” the question whether the procedural changes effectuated through the adoption of the FRCP “may sharply diminish the scope of traditional equitable remedies by making them unnecessary in many cases.”<sup>195</sup> As such, the Court held the trial judge violated the licensee’s Seventh Amendment right by failing to grant the jury trial demand on the factual issues connected with the trademark owners’ money damages claim for breach of contract: “Since these issues are common with those upon which [the trademark owners’] claim to

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189. *Id.* at 473–75.

190. *McCullough v. Dairy Queen, Inc.*, 194 F. Supp. 686, 687–88 (E.D. Pa. 1961), *rev’d sub nom. Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962). The district court’s decision relied on and was consistent with the established equitable clean-up doctrine, which permits a chancellor in equity to adjudicate any legal issues incidental to the equitable claim as a way to “effective[ly] terminat[e] . . . the entire matter in dispute.” A. Leo Levin, *Equitable Clean-Up and the Jury: A Suggested Orientation*, 100 U. PA. L. REV. 320, 320 (1951) (citing 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 181, 231 (5th ed., Symons 1941)); STORY, EQUITY JURISPRUDENCE, *supra* note 60, § 64 (“It is familiar law that a litigant in equity may ask and receive damages or other relief normally awarded in a court of law.”).

191. The Third Circuit denied the licensee’s request to vacate the trial judge’s order without opinion. *Dairy Queen*, 369 U.S. at 470.

192. *Id.* at 477–78; *see also id.* at 478 (“[I]n order to maintain [a suit for an equitable accounting] on a cause of action cognizable at law, . . . the plaintiff must be able to show that the ‘accounts between the parties’ are of such a ‘complicated nature’ that only a court of equity can satisfactorily unravel them.” (quoting *Kirby*, 120 U.S. at 134)).

193. *Id.* at 470.

194. *Id.* at 478.

195. *Id.* at 478 n.19.

equitable relief is based, the legal claims involved in the action must be determined prior to any final court determination of [the] equitable claims.”<sup>196</sup> Although no Justice filed a dissent in *Dairy Queen*,<sup>197</sup> legal commentators have pointed out that the *Dairy Queen* opinion by Justice Black “reflects the strong federal preference for trial by jury,”<sup>198</sup> because “equity would frequently have tried without a jury the very kinds of legal issues which were presented” in *Beacon Theatres* and *Dairy Queen*.<sup>199</sup>

#### E. *ROSS V. BERNHARD*

*Dairy Queen* set the stage for *Ross v. Bernhard*, where the Court held that the Seventh Amendment jury trial right extends to the shareholders’ derivative suit,<sup>200</sup> even though traditionally the suit had been available only in equity.<sup>201</sup> *Ross* is a crucial step in the progression of the right to jury trial because if litigants in derivative suits are entitled to a jury trial, the inferential leap to litigants in class suits is slight.<sup>202</sup> A principal reason for this is that “the derivative suit and the class action” both arose as “ways of allowing parties to be heard in equity who could not speak at law.”<sup>203</sup> Moreover, some of the “recognized purpose[s]” behind FRCP 23.1 (governing derivative actions) are similar to those of FRCP 23 (governing class actions): “avoid[ing] multiplicity of suits . . . by individual shareholders or small groups of shareholders” and

196. *Id.* at 479.

197. Justice Stewart, who filed the dissenting opinion in *Beacon Theatres*, concurred in *Dairy Queen*’s result without filing an opinion. *See id.* at 480. Justice Harlan, who had joined Justice Stewart’s *Beacon Theatres* dissent, concurred and filed a brief opinion, in which Justice Douglas joined. *See id.* at 480–81. Justice Whittaker, who had also joined the *Beacon Theatres* dissent, retired from the Court on March 31, 1962, prior to the issuance of the Court’s decision in *Dairy Queen*. *See* Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 53 n.68 (2008).

198. Watkins, *supra* note 122, at 680.

199. James, *supra* note 9, at 688 n.189.

200. Shareholders bring derivative suits against third parties on behalf of the corporation. *See, e.g.,* Ken Randall & Hunter Hill, *Corporate Governance and the HealthSouth Derivative Litigation*, 71 ALA. LAW. 128, 135 (2010). “After making an unsuccessful demand that the corporation bring the suit, or showing demand futility, a shareholder may proceed with an action, in the corporation’s name, against an officer, director and/or another party who allegedly injured the company.” *Id.* Though shareholders file the derivative suit with the corporation as a nominal party, the corporation is the real party in interest, and any proceeds obtained from a successful action go to the corporation. *See id.* Still, as “the shareholders are owners of the corporation, they benefit from a positive litigation result.” *Id.*

201. 396 U.S. 531, 538–42 (1970).

202. In fact, the *Ross* Court itself nearly made the inferential leap in dicta by utilizing an analogy to class suits in order to illustrate a point about derivative suits. *See id.* at 541 (“Derivative suits have been described as one kind of true class action.” (internal quotation marks omitted)). Similarities notwithstanding, there are of course important differences between derivative suits and class actions. For example, in a derivative suit, shareholders of a corporation bring suit on the corporation’s behalf whereas, in a class action, a class of individuals brings suit on its own behalf. *Compare* FED. R. CIV. P. 23.1, *with* FED. R. CIV. P. 23.

203. *Ross*, 396 U.S. at 541.

“permit[ing] claimants with a small loss to assert valid claims which they could not otherwise afford to litigate.”<sup>204</sup>

In *Ross*, shareholders of Lehman Corporation brought a derivative action on Lehman’s behalf asserting a host of claims against the company’s directors and brokers.<sup>205</sup> After the district court granted the stockholders’ jury trial demand over a motion to strike by the directors and brokers, the Second Circuit reversed, “holding that a derivative action was entirely equitable in nature, and no jury was available to try any part of it.”<sup>206</sup> The Supreme Court reversed and held that, in the post-FRCP context where law and equity are merged into a single procedural system, whether the right to jury trial attaches hinges on the character of the substantive claims, rather than the procedural device—like shareholders’ derivative actions or class suits—through which the claims came to the court.<sup>207</sup> In a footnote, the Court indicated that whether the nature of an issue is “legal” depends on “first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries.”<sup>208</sup>

With Justice White writing for the majority in a six-to-three decision, the Court conceded that derivative suits are historically equitable in nature, but held that “legal claims are not magically converted into equitable issues by their presentation to a court of equity in a derivative suit.”<sup>209</sup> Accordingly, where, as here, the stockholders’ claim contained “a legal issue,” the shareholders did not forfeit the jury trial right “merely because the stockholder’s right to sue must first be adjudicated as an equitable issue triable to the court.”<sup>210</sup> The implication of this holding is that any defendant making a legal counterclaim to a suit

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204. *Brooks v. Land Drilling Co.*, 564 F. Supp. 1518, 1521 (D. Colo. 1983); see *Buford v. H & R Block, Inc.*, 168 F.R.D. 340, 345–46 (S.D. Ga. 1996) (noting that “essential purposes” of class actions include “facilitat[ing] judicial economy by the avoidance of multiple suits on the same subject matter” and “provid[ing] a feasible means for asserting the rights of those who ‘would have no realistic day in court if a class action were not available’” (quoting *Phillips Petroleum Co. v. Shutts*, 422 U.S. 797, 809 (1985)) (citing *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550 (1974)). Another parallel between FRCP 23.1 and FRCP 23 is that “[t]he plaintiff stockholders in a derivative action,” like the representatives of a class, “must fairly and adequately represent the interest of the other shareholders similarly situated.” *Brooks*, 564 F. Supp. at 1521. Compare FED. R. CIV. P. 23.1(a), with FED. R. CIV. P. 23(a).

205. 396 U.S. at 531–32.

206. *Id.* at 532.

207. *Id.* at 538 (“The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action.”).

208. *Id.* at 538 n.10. In dissent, Justice Stewart strenuously criticized the Court’s approach, arguing that it created a significant classification problem. *Id.* at 550 (Stewart, J., dissenting).

209. *Id.* at 538 (majority opinion). The Court stressed that the shareholder is merely a nominal plaintiff, and the corporation is the real party in interest because the proceeds derived from the suit “belong to the corporation,” and the “heart of the action is the corporate claim.” *Id.* at 538–39.

210. *Id.* at 539. “[T]he right to jury trial attaches to those issues in derivative actions as to which the corporation, if it had been suing in its own right, would have been entitled to a jury.” *Id.* at 532–33.

in equity has the automatic right for a jury to decide the merits of all factual issues. Justice White argued that, given how the FRCP combined procedures of law and equity, “nothing turns now upon the form of the action or the procedural devices by which the parties happen to come before the [C]ourt.”<sup>211</sup> The holdings of *Beacon Theatres* and *Dairy Queen* “require no less.”<sup>212</sup> The Court then offered the analogous example of class suits,<sup>213</sup> which prior to the FRCP had been “largely a device of equity” such that “there was no right to a jury even on issues that might, under other circumstances, have been tried to a jury.”<sup>214</sup> The Court noted that since the FRCP’s merger of law and equity, although at least one court had sustained the pre-merger view, “it now seems settled in the lower federal courts that class action plaintiffs may obtain a jury trial on any legal issues they present.”<sup>215</sup> This passage, and *Ross*’s holding that the plaintiff in a shareholder’s derivative suit has a constitutional right to jury trial, subsequently became the basis for Justice Souter’s pronouncement in *Ortiz* that the Seventh Amendment protects class action plaintiffs.<sup>216</sup>

In a dissent joined by Chief Justice Burger and Justice Harlan, Justice Stewart argued that the *Ross* Court’s decision might only be explicable “as a reflection of an unarticulated but apparently overpowering bias in favor of jury trials in civil actions” because the decision “certainly [could not] be explained in terms of either the Federal Rules or the Constitution.”<sup>217</sup> Instead, in the view of the dissent, the majority somehow permitted the FRCP and the Seventh Amendment to “magically interact to do what each separately was expressly intended not to do, namely, to *enlarge* the right to a jury trial in

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211. *Id.* at 540.

212. *Id.* at 539. To support this proposition, Justice White quoted *Beacon Theatres*: “The ‘expansion of adequate legal remedies provided by . . . the Federal Rules necessarily affects the scope of equity.’” *Id.* at 540 (alteration in original) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 509 (1958)). Accordingly, the Court argued that “[a]fter the adoption of the [R]ules [in 1938] there is no longer any procedural obstacle to the assertion of legal rights before juries, however the party may have acquired standing to assert those rights.” *Id.* at 542. *But see id.* at 546 (Stewart, J., dissenting) (“[A]ny [p]urely procedural impediments to a jury trial in a derivative suit were eliminated, not in 1938, but at least as early as 1912.” (internal quotations omitted)). Justice Stewart’s dissent pointed out that “Rule 23 of the Equity Rules [of 1912] provided that if a ‘matter ordinarily determinable at law’ arose in an equity suit it should ‘be determined in that suit according to the principles applicable, without sending the case or question to the law side of the court.’” *Id.* at 546–47 (quoting *FED. EQUITY R.* 27, 226 U.S. 654 (1912) (repealed in 1938 with the adoption of the FRCP)). As the “applicable principles included the right of jury trial,” the Court erred in its suggestion that procedural impediments functioned to block the exercise of the Seventh Amendment right. *Id.* at 547.

213. *Id.* at 541 (majority opinion).

214. *Id.* at 540.

215. *Id.* at 541.

216. *See Ortiz v. Fibreboard*, 527 U.S. 815, 846 (1999).

217. *Ross*, 396 U.S. at 551 (Stewart, J., dissenting).

civil actions brought in the courts of the United States.”<sup>218</sup> Justice Stewart criticized the Court for ignoring “history, logic, and over 100 years of firm precedent.”<sup>219</sup> The dissent pointed out that, as the Court conceded, “a shareholder’s derivative suit could be brought only in equity[;] . . . the most elementary logic [dictates] that in such suits there is no constitutional right to a trial by jury.”<sup>220</sup> In a prescient closing line of criticism, Justice Stewart argued that “the logic of the Court’s position would lead to the virtual elimination of all equity jurisdiction” because it “require[s] that if any ‘legal issue’ procedurally *could* be tried to a jury, it constitutionally *must* be tried to a jury.”<sup>221</sup>

#### F. *ORTIZ V. FIBREBOARD*

Relying directly on *Ross*, the Court held in *Ortiz v. Fibreboard* that the presence of legal issues in a class action suit triggers the Seventh Amendment’s jury trial right.<sup>222</sup> *Ortiz* presented the Court with a suit “prompted by the elephantine mass of asbestos cases” involving an immense class of claimants who sued a prominent manufacturer of various products containing asbestos.<sup>223</sup> Seeking funds to pay the claimants, the manufacturer sued its two insurance carriers.<sup>224</sup> Extensive negotiations between the attorneys for the class, the manufacturer, and the insurance companies produced a global settlement fund of \$1.525 billion, contingent upon (1) certification under FRCP 23(b)(1)(B) as a mandatory class<sup>225</sup> and (2) judicial approval of the settlement as a limited fund.<sup>226</sup> The decisions by

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218. *Id.* at 543 (emphasis added).

219. *Id.* at 544.

220. *Id.* Justice Stewart also took issue with the majority’s claim that a prevailing view had emerged in the lower federal courts to the entitlement of litigants in class action suits to the Seventh Amendment jury trial right. *Id.* at 546 (noting that rather than a prevailing view in the lower federal courts supporting the Court’s position, a “unanimous view” existed to the contrary, with the single exception of a Ninth Circuit case that had not been followed prior to the majority opinion).

221. *Id.* at 549–50 (“The fact is, of course, that there are, for the most part, no such things as inherently ‘legal issues’ or inherently ‘equitable issues.’ There are only factual issues, and, ‘like chameleons [they] take their color from surrounding circumstances.’ Thus the Court’s ‘nature of the issue’ approach is hardly meaningful.” (alteration in original) (quoting James, *supra* note 9, at 692)).

222. 527 U.S. 815, 845–46.

223. *Id.* at 821–22.

224. *Id.* at 822–23.

225. FRCP 23(b)(1)(B) is designed to certify classes whose members have no withdrawal right. See *id.* at 833. Cases falling within this category possess a shared character of rights or relief, such that “prosecution of separate actions . . . would create a risk” of “adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.” *Id.* at 833 (alteration in original) (quoting FED. R. Civ. P. 23(b)(1)(B)) (internal quotation marks omitted).

226. *Id.* at 823–25. A limited fund, at least as traditionally conceived, “is a pool of money coming from an outside source, the amount of which is not subject to manipulation by the parties.” *In re Teletronics Pacing Sys.*, 221 F.3d 870, 873 (6th Cir. 2000).

the lower courts satisfied these contingencies.<sup>227</sup> The Fifth Circuit certified the claimants as a FRCP 23(b)(1)(B) non-opt-out, mandatory class and approved the settlement as being in the claimants' best interest.<sup>228</sup>

The Court reversed, finding that to be certified on an FRCP 23(b)(1)(B) limited fund theory, a fund must be "limited by more than the agreement of the parties."<sup>229</sup> More importantly to this discussion, the Court held that such a mandatory class-action settlement "compromises" the Seventh Amendment right to jury trial of absentee class members.<sup>230</sup> The Court began its consideration of the issue by noting how the REA "underscores the need for caution," and how "no reading of [FRCP 23(b)(1)(B)] can ignore the [REA's] mandate that 'rules of procedure shall not abridge, enlarge or modify any substantive right.'"<sup>231</sup> At the time of the REA's enactment, litigants in class action cases had no right to jury trial because of the historically-rooted recognition of such suits as falling under equity jurisdiction.<sup>232</sup> Despite its words of caution, the Court proceeded to declare that a mandatory class action settlement under FRCP 23(b)(1)(B) "obviously implicates" that constitutional right for class members who are absent.<sup>233</sup> It referenced the view of the *Ross* Court that, dating back to the FRCP's procedural merger of law and equity, "it has become settled among the lower courts that 'class action plaintiffs may obtain a jury trial on any legal issues they present.'"<sup>234</sup> Therefore, the Court held that where a class action suit involves legal issues, the Seventh Amendment entitles the class members to have their case heard by a jury.<sup>235</sup> *Ortiz* thus concludes a line of cases transforming class suits from their historic status as proceedings in equity into proceedings at law, with the attendant presumption that the right to jury trial is constitutionally protected.

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227. See *Ortiz*, 527 U.S. at 825–30.

228. *Id.* at 829–30. The claimants otherwise risked losing the fund if the insurance companies won the pending no-coverage cases. See *id.* at 827–28.

229. *Id.* at 821.

230. *Id.* at 845–48. The Court also held that a FRCP 23(b)(1)(B), non-opt-out settlement violated the due process rights of absentee class members. See *id.*

231. *Id.* at 845 (quoting *Amchem. Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997)) (internal quotation marks omitted).

232. See *supra* Part I.D.

233. *Ortiz*, 527 U.S. at 845–46 (citing U.S. CONST. amend. VII).

234. *Id.* at 846 (quoting *Ross v. Bernhard*, 396 U.S. 531, 541 (1970)).

235. *Id.* at 845–46. Pursuant to the Court's holding, therefore, a non-opt-out class-action settlement containing legal issues "compromises" the Seventh Amendment jury trial right of absentee class members without their consent. See *id.* Importantly, the Court indicated that part of what such a settlement undercuts is the ability of individual claimants to recover the millions of dollars in money damages that are sometimes won in individual personal injury or wrongful death suits. *Id.* at 847 n.23.

### III. *ORTIZ* GOT IT WRONG: THE COURT SHOULD RETURN FRCP 23 CLASS ACTION SUITS TO EQUITY JURISDICTION

The line of decisional law from *Stewart* to *Ortiz* suggests that the Court effectively read the REA and the FRCP as expanding the scope of the Seventh Amendment's right to jury trial. While Justice Stewart, who dissented in *Beacon Theatres* and *Ross*, appears not to have won the day, the Court's jurisprudence still stands in opposition to the pronouncement of the REA that the FRCP "neither abridge, enlarge, nor modify the substantive rights of any litigant."<sup>236</sup> Though the Court itself has recognized this tension,<sup>237</sup> it has failed to abide by the mandate of the REA. The class action suit was "an invention of equity"<sup>238</sup> and was recognized as such from 1791, when adoption of the Seventh Amendment preserved the right to jury trial only as it existed "[i]n Suits at common law,"<sup>239</sup> up until at least the 1938 adoption of the FRCP.<sup>240</sup> If the FRCP are to be read fairly so as not to enlarge a litigant's substantive rights, then surely the FRCP should not serve as a springboard for abridging the scope of equity and applying the Seventh Amendment's jury trial right to class action suits under FRCP 23.<sup>241</sup>

#### A. THE REJECTION OF THE *BEACON THEATRES* LINE IN STATE COURTS AND THE INADEQUACY OF THE JURY IN THE CLASS ACTION CONTEXT

The fact that many state courts do not follow *Beacon Theatres* and its progeny is persuasive evidence of the flaw in the Court's line of decisional law. This echoes Justice Stewart's sentiment in his dissenting opinion in *Ross*: "*Ross* is one of a long line of cases in which [the Court] . . . reread the historical underpinnings of the Seventh Amendment in an effort to compose a new logic for that section of the Constitution."<sup>242</sup> A sizeable number of states reject the holding of *Ross* and continue to utilize the traditional distinction between law and equity to govern the applicability of the right to jury trial.<sup>243</sup> The influence of the

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236. Rules Enabling Act of 1934, Pub. L. No. 73-415, ch. 651, § 1, 48 Stat. 1064 (current version at 28 U.S.C. § 2072(b) (2006)).

237. See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) ("Rule 23's requirements must be interpreted in keeping with . . . the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'").

238. *Hansberry v. Lee*, 311 U.S. 32, 41 (1940).

239. U.S. CONST. amend. VII.

240. See *supra* Part I.A-D.

241. See *supra* Part II; see also *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (holding that broadening the FRCP, at a minimum, "is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation").

242. *Rankin v. Frebank Co.*, 121 Cal. Rptr. 348, 359 (Ct. App. 1975).

243. See, e.g., *Hames v. Cravens*, 966 S.W.2d 244, 246-48 (Ark. 1998); *Nelson v. Anderson*, 84 Cal. Rptr. 2d 753, 760 (Ct. App. 1999); *Lanman Lithotech, Inc. v. Gurwitz*, 478 So. 2d 425, 426-27 (Fla. Dist. Ct. App. 1985); *Weltzin v. Nail*, 618 N.W.2d 293, 295-303 (Iowa 2000); *Pelfrey v. Bank of Greer*,



Court's decision in *Ross* is further "hindered by the fact that the Seventh Amendment has never been made applicable to the states."<sup>244</sup> Importantly, the *Ortiz* Court looked and cited to *Ross* to support its holding that class action suit litigants have a Seventh Amendment right to jury trial.<sup>245</sup> Federal and state courts differ somewhat in their outlooks, feelings, attitudes, and policies regarding the right to jury trial.<sup>246</sup> Federal decisional law favors jury trials in a considerably broader range of cases than any fair reading of the Constitution and its history requires.<sup>247</sup> The *Beacon Theatres* line of cases reads a populist view of juries into the Seventh Amendment.<sup>248</sup> While the jury trial is an important and cherished part of the legal system,<sup>249</sup> it is ineffective and burdensome in complicated cases such as massive class action suits,<sup>250</sup> which "form a

244 S.E.2d 315, 316-17 (S.C. 1978); see also *Hashem v. Taheri*, 571 A.2d 837, 839 (Md. Ct. Spec. App. 1990) ("If a claim is brought that historically would have been filed on the law side of the court and a jury trial is properly demanded, a jury will hear the case. Equitable claims will be decided by the court without a jury."); *Minn. ex rel. Humphrey v. Alpine Air Prods., Inc.*, 490 N.W.2d 888, 895-96 (Minn. Ct. App. 1992) (discussing Minnesota's adherence to the historical test); *Lyn-Anna Props., Ltd. v. Harborview Dev. Corp.*, 678 A.2d 683, 689 (N.J. 1996) (In determining the right to jury trial, "New Jersey's legal history and traditions . . . place[] a greater emphasis on the distinct roles of its law and chancery courts" than do the federal courts.); *Rosenberg v. Rosenberg*, 419 A.2d 167, 168 (Pa. Super. Ct. 1980) (noting that the state constitution "does not permit a jury trial in . . . ordinary equity action[s]").

244. *Weltzin*, 618 N.W.2d at 298; see also *Rankin*, 121 Cal. Rptr. at 362 (holding that plaintiffs in a shareholder's derivative suit could not rely on *Ross* to support their efforts to obtain a jury trial).

245. See *supra* Part II.F. Federal judges were 18.7% more likely to answer that the system was "fine just the way it is." Michelle L. Hartmann, *Is It a Short Trip Back to Manor Farm? A Study of Judicial Attitudes and Behaviors Concerning the Civil Jury System*, 54 SMU L. REV. 1827, 1832 (2001).

246. See *Judges' Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spend at Least Half Their Time on General Civil Cases*, 69 B.U. L. REV. 731, 746 (1989) (reporting the finding from a study of the jury system that state trial judges were eleven percent less likely than federal judges to reject the idea that "the feelings of the jurors about the parties often cause them to make inappropriate decisions"); Hartmann, *supra* note 245, at 1832, 1845 (reporting research results showing that Texas state trial judges were nearly one-fifth less likely than federal judges nationwide to consider the jury trial system "fine just the way it is," and almost ten percent less likely to contend that "juries do 'very well' in reaching a just and fair verdict" (internal quotation marks omitted)).

247. See *supra* Part II.

248. See *Ross v. Bernhard*, 396 U.S. 531, 551 (1970) (Stewart, J., dissenting) (observing that the *Ross* Court's decision might be defensible only "as a reflection of an unarticulated but apparently overpowering bias in favor of jury trials in civil actions" because the decision "certainly [could not] be explained in terms of either the Federal Rules or the Constitution"); Brodin, *supra* note 116, at 30-33 (1990) (discussing how the Court's "[p]reference for the wisdom of the lay jury over the professional judge" dates back to the late nineteenth century).

249. See Brodin, *supra* note 116, at 15 (describing the longstanding recognition of the "jury trial [as] the central element in the American conception of justice" (quoting REID HASTIE ET AL., *INSIDE THE JURY I* (1983) (internal quotation marks omitted))).

250. See *Ross*, 396 U.S. at 545 n.5 ("[W]here the issues in the case are complex . . . much can be said for allowing the court . . . to try the case itself."); Brodin, *supra* note 116, at 18 ("Considerable skepticism has been voiced over the years about the average juror's ability to comprehend and recall the evidence presented at trial as well as the judge's instructions on the law, particularly in 'big' or 'technical' cases. Such concerns have even led to suggestions in the decisional law that the constitutional right to civil jury trial in the federal courts may not apply in complex litigation because

large portion of complex litigation.”<sup>251</sup> In those cases, the supposed virtue of lay juries is less apparent.<sup>252</sup> As one commentator reports, “a growing body of empirical studies has uniformly concluded that . . . juries often misunderstand and misapply judges’ instructions regarding the law[,] . . . typically understand[ing] fewer than half of the legal instructions they are given.”<sup>253</sup>

#### B. EXPANSION OF EQUITABLE POWERS IN PLEADING, CLASS CERTIFICATION, AND SUMMARY JUDGMENT STAGES AND THE CLASS ACTION FAIRNESS ACT

Recent Supreme Court jurisprudence, outside of the decision in *Ortiz*, indicates a measure of concern amongst at least some members of the Court about the damage caused by *Beacon Theatres* and its progeny. Reflected in this concern is a corresponding endeavor to employ equitable powers to curb liberalized procedural rules and to subtly modify the effects of that line of decisional law by shifting the power in these cases away from juries. One example is the reinterpretation, first, in *Bell Atlantic Corp. v. Twombly*<sup>254</sup> and then, in *Ashcroft v. Iqbal*,<sup>255</sup> of

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presentation of such a case to an uncomprehending jury would constitute a denial of due process.” (footnote omitted)); Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 183 (2000) (describing the view that “civil juries are inefficient, unpredictable, swayed by sympathy, and incompetent to decide complex cases”); see also STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 4–17 (1995) (surveying some of the prevailing criticisms of juries).

251. Christopher P. Lu, *Procedural Solutions to the Attorney's Fee Problem in Complex Litigation*, 26 U. RICH. L. REV. 41, 41–42 (1992); see also *id.* at 42 & n.6 (noting the “major burden on the judicial system” and the “time-consuming nature” of complex litigation such as large class action suits that involve multiple litigants and issues).

252. See Brodin, *supra* note 116, at 18 (discussing how juries are ill-suited for complex cases); Moses, *supra* note 250, at 183 (same); Ann M. Scarlett, *Shareholders in the Jury Box: A Populist Check Against Corporate Mismanagement*, 78 U. CIN. L. REV. 127, 154 (2009) (“Legal historian Lance Friedman found . . . that twentieth-century juries desired total justice and expected fair treatment and full compensation for undeserved suffering. Such desires, as well as lawyers’ negative views of juries’ ability to rationally award damages, may help explain the development of technical rules of evidence governing damages issues. . . . These rules are ‘designed to blindfold jurors, keeping from them information for fear that it might adversely affect their decisionmaking process.’” (quoting William W. Schwarzer & Alan Hirsch, *The Modern American Jury: Reflections on Veneration and Distrust*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 399, 402 (Robert E. Litan ed., 1993)) (citing Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 53 (1967))). See generally DANIELS & MARTIN, *supra* note 250, at 4–17; VERDICT: ASSESSING THE CIVIL JURY SYSTEM, *supra*.

253. Larry D. Thompson & Charles J. Cooper, *The State of the Judiciary: A Corporate Perspective*, 95 GEO. L.J. 1107, 1116–17 (2007); see also Brodin, *supra* note 116, at 25 (“[Juries give verdicts with] no explanation of how the decision was reached . . . . In this regard the use of the jury resemble[s] its ancient forbears, trial by ordeal and by battle, where similarly there was no division between fact and law but only a decision on the general question of guilt.”).

254. 550 U.S. 544 (2007).

255. 129 S. Ct. 1937 (2009).

FRCP 8 as requiring fact pleading instead of mere notice pleading.<sup>256</sup> The enhanced pleading requirement under *Twombly* and *Iqbal*, to plead some evidence to survive FRCP 12(b)(6) motions to dismiss, expands the scope of the district court judge's quasi-equitable powers at the pleadings stage.<sup>257</sup> These decisions give district court judges greater power to dismiss a suit for failing to satisfy FRCP 8 on the basis that the suit is unlikely to succeed on the merits.<sup>258</sup> Another example of the response to the *Beacon Theatres* line of decisional law is the reconfiguration of the summary judgment standard in *Celotex Corp. v. Catrett*.<sup>259</sup> *Celotex* shifted the standard toward equitable jurisdiction by heightening the level of fact-showing necessary to survive summary under FRCP 56(c) and to move from the judge-supervised pre-trial phase—a form of quasi-equity jurisdiction—to the jury trial phase of litigation.<sup>260</sup> These modifications to the treatment of a suit at the dismissal and summary judgment stages give the lower federal courts greater discretion to expand the scope of the pre-trial phase and curtail the progression of suits into the jury trial phase.

One final example is the shift in which the lower federal courts make material determinations of disputed facts during the class certification stage, as though class action suits were being treated under quasi-equitable jurisdiction. The Court's decision in *Eisen v. Carlyle & Jacquelin* set federal district courts' sole role at the certification stage as a mere determination of whether the FRCP 23 requirements are satisfied.<sup>261</sup> *Eisen* held that the district courts do not have the "authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."<sup>262</sup> However, when pertinent facts related to the FRCP 23 certification determination are disputed, those disputed facts could potentially overlap with facts

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256. See *id.* at 1950–54; *Twombly*, 550 U.S. at 553–63.

257. See *Iqbal*, 129 S. Ct. at 1940 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."); *Twombly*, 550 U.S. at 553–63 (holding that surviving an FRCP 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted requires factual allegations sufficient to raise the plaintiff's claim for relief above the level of speculation, assuming the truth of the complaint's allegations, even if doubtful in fact).

258. See *Iqbal*, 129 S. Ct. at 1950 ("Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."); *Twombly*, 550 U.S. at 570 (holding that to survive dismissal, the complaint must provide "enough facts to state a claim to relief that is plausible on its face").

259. 477 U.S. 317 (1986).

260. The "party seeking summary judgment always bears the initial responsibility of . . . demonstrat[ing] the absence of a genuine issue of material fact." *Id.* at 323.

261. 417 U.S. 156, 177–78 (1974).

262. *Id.* at 177.

relevant to the merits of the case.<sup>263</sup> In spite of *Eisen*'s holding, then, district courts adjudicating FRCP 23 class certification must sometimes look beyond the pleadings and consider facts pertaining to the merits.<sup>264</sup> The general consensus among the circuits is that *Eisen*'s prohibition on an inquiry into the merits only applies to merits issues wholly unrelated to FRCP 23's requirements.<sup>265</sup> As one commentator observes, "[*Eisen*] has . . . been circumvented with increasing boldness by the lower courts."<sup>266</sup> In *General Telephone Co. of Southwest v. Falcon*, the Court itself declared that district courts should not apply the FRCP 23 prerequisites too leniently: "[S]ometimes it may be necessary for [courts] to *probe behind the pleadings* before coming to rest on the certification question."<sup>267</sup> The Court held that class certification thus hinges on whether "the trial court is satisfied, *after a rigorous analysis*, that the

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263. See William B. Rubenstein, *Rigorous Analysis and Class Certification*, in A.B.A. SEC. LITIG. & THE CENTER FOR CONTINUING LEGAL EDUC., 12TH ANNUAL NATIONAL INSTITUTE ON CLASS ACTIONS D-1, D-2 (2008) ("The requirements of numerosity, commonality, and typicality generally require factual showings by the plaintiff. In 23(b)(3) class action, the plaintiff will also have to use facts to demonstrate the existence of predominance and superiority.").

264. See, e.g., *Oscar Private Equity Invs. v. Allegiance Telecomm, Inc.*, 487 F.3d 261, 268 (5th Cir. 2007) ("A district court still must give full and independent weight to each Rule 23 requirement, regardless of whether that requirement overlaps with the merits.").

265. See, e.g., *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 17 (1st Cir. 2008) ("It would be contrary to the 'rigorous analysis of the prerequisites established by Rule 23 before certifying a class' to put blinders on as to an issue simply because it implicates the merits of the case." (quoting *Smilow v. Sw. Bell Mobile Sys., Inc.* 323 F.3d 32, 38 (1st Cir. 2003))); *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 306 (5th Cir. 2007) ("Although federal courts cannot assess the merits of the case at the certification stage, they must evaluate with rigor 'the claims, defense, relevant facts and applicable substantive law in order to make a meaningful determination of the certification issues.'" (quoting *Unger v. Amedisys Inc.*, 401 F.3d 316, 321 (5th Cir. 2005))); *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 32–42 (2d Cir. 2006); *Gariety v. Grant Thornton L.L.P.*, 368 F.3d 356, 364–67 (4th Cir. 2004); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166 (3d Cir. 2001) ("Because the determination of a certification request invariably involves some examination of factual and legal issues underlying the plaintiffs' cause of action, a court may consider the substantive elements of the plaintiff's case."); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001) (explaining that "a judge should make whatever factual and legal inquiries are necessary under Rule 23" even if that means "the judge must make a preliminary inquiry into the merits"); see also *Wright v. Schock*, 742 F.2d 541, 545 (9th Cir. 1984) (noting that *Eisen* "does not say that a court may never consider the merits of a suit prior to a class determination").

266. Barlett H. McGuire, *The Death Knell for Eisen: Why the Class Action Analysis Should Include an Assessment of the Merits*, 168 FED. RULES DECISIONS 366, 368 (1996); see also Steig D. Olson, "Chipping Away": *The Misguided Trend Toward Resolving Merits Disputes as Part of the Class Certification Calculus*, 43 U.S.F. L. REV. 935, 935 ("Class certification jurisprudence is in a state of flux as a result of a trend in which federal courts of appeals are using class certification calculus to resolve genuinely disputed merits issues.").

267. 457 U.S. 147, 160 (1982) (emphasis added). The Court proceeded to note, "Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation." *Id.* The Court called a certification order "inherently tentative" and commented, "This flexibility enhances the usefulness of the class-action device." *Id.* (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11 (1978)) (internal quotation marks omitted).

prerequisites of Rule 23(a) have been satisfied.”<sup>268</sup> *Falcon* has come to stand “for the proposition that a class may only be certified after rigorous analysis.”<sup>269</sup> The lower federal courts thus cannot simply accept the allegations of the class as true; they must engage in what amounts to careful, quasi-equitable consideration of the merits at the class certification stage.<sup>270</sup>

Congress’s recent expansion of federal jurisdiction over class action suits through the Class Action Fairness Act of 2005 (CAFA) indicates that it too has begun to worry about the effects of the enlarged right to jury trial in class action suits.<sup>271</sup> CAFA expands federal jurisdiction over large class action suits, serving to facilitate the removal of more class actions to federal court.<sup>272</sup> Once there, the approach of the lower federal courts to pleading, summary judgment, and class certification serves to effectuate quasi-equity jurisdiction during the pre-trial phases and to curb the majority of suits from progressing to the jury trial phase.

### CONCLUSION

The text of the Seventh Amendment and its historical context indicate that the right to jury trial does not extend to class action suits. By its plain language, the Seventh Amendment merely preserves the right to jury trial at common law as it existed in 1789 or 1791 and does not apply to actions traditionally classified as equitable. As class action suits were historically cognizable in equity, they traditionally proceeded without a right to jury trial. The first 150 years of American class action jurisprudence recognized the distinction drawn in the Constitution between law and equity, and class action suits proceeded exclusively in equity. While the adoption of the FRCP in 1938 served to liberalize federal civil procedure, it did not expand the Seventh Amendment or eliminate the historic distinction between legal and equitable actions. In fact, the REA—the Act authorizing the FRCP—expressly retained that distinction in its pronouncement that the FRCP “shall neither abridge, enlarge, nor modify the substantive rights of any litigant.”<sup>273</sup> Accordingly, Justice Black’s reasoning in *Beacon Theatres* about the effect of the FRCP on the Seventh Amendment was a distortion.<sup>274</sup> *Beacon Theatres*

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268. *Id.* at 161 (emphasis added).

269. Rubenstein, *supra* note 263, at D-1.

270. *Id.*

271. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (current version at 28 U.S.C. § 1332(d)(2), 1453, 1711-15).

272. “[T]he CAFA confers federal diversity jurisdiction over class actions where the aggregate amount in controversy exceeds \$5 million.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 571 (2005).

273. Rules Enabling Act of 1934, Pub. L. No. 73-415, ch. 651, § 1, 48 Stat. 1064 (current version at 28 U.S.C. § 2072(b) (2006)).

274. See *supra* Part II.B-C.

was wrongly decided, an abrupt turn that facilitated the breakdown of the distinction between law and equity.<sup>275</sup> The Court's treatment of law and equity in *Stewart* should have remained the prevailing federal decisional law.<sup>276</sup> Instead, the Court expanded its *Beacon Theatres* holding, extending the notion that the FRCP had the effect of making all actions traditionally available only in equity now available at law (by way of trial by jury). In *Dairy Queen*, *Ross*, and then *Ortiz*, the Court relied on *Beacon Theatres* to extend the Seventh Amendment right to jury trial to the accounting, the shareholders' derivative suit, and finally the class action, all claims that by any historical test were cases in equity.<sup>277</sup>

The Supreme Court ought to restore the historically supported dual system, particularly in the context of historically equitable class action suits. The distinction between law and equity reflects "the pragmatic judgment by wise and experienced men of what matters were suitable for jury trial."<sup>278</sup> The Court should return to a more express reading of and truer adherence to the mandate of the REA. It should no longer read the Seventh Amendment as affording the right to jury trial in class action suits under FRCP 23.

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275. *Id.*

276. *See supra* Part II.A–C.

277. *See supra* Part II.D–F.

278. James, *supra* note 9, at 668 (1963) ("For good or evil, both the constitutions and the charters of the merged procedure embody the policy judgment, quite deliberately made, to leave the extent of jury trial about where history had come to place it. It may well be doubted whether it lies within the proper sphere of the judicial process to nullify that judgment . . .").

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